

(25,489)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 669.

JOHN H. FRIEDERICHSEN, PETITIONER,

vs.

G. H. RENARD, AS EXECUTOR OF THE ESTATE OF
EDWARD RENARD, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.

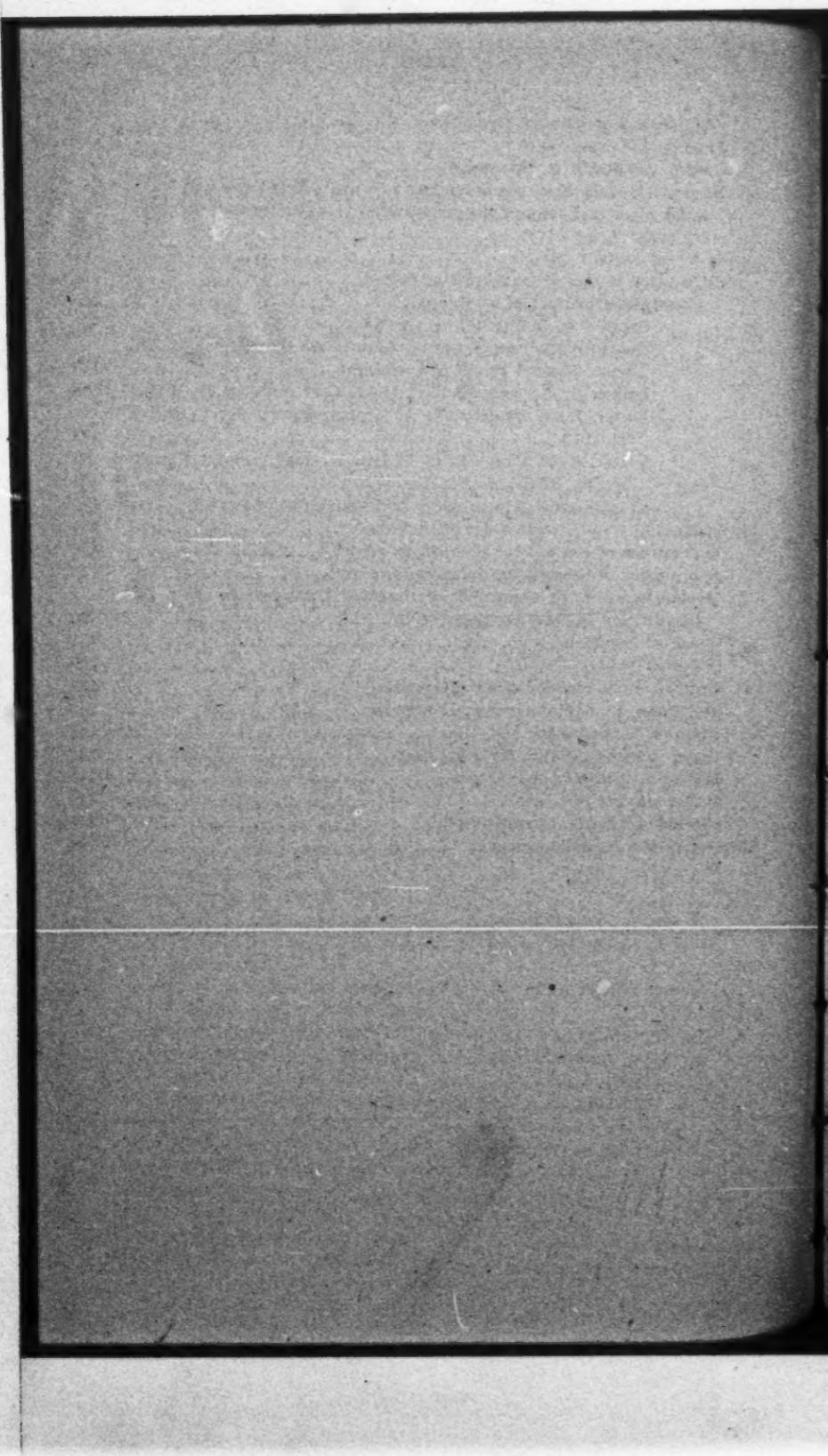
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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1915, of said court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,

*Clerk of the United States Circuit
Court of Appeals for the Eighth Circuit.*

Be it Remembered that heretofore, to-wit: on the seventeenth day of May, A. D. 1915, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein John H. Friederichsen was Plaintiff in Error and Edward Renard, in his own right, and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, were Defendants in Error, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(a)

2

1 Pleas, before the Honorable Thomas C. Munger, Judge of the District Court of the United States, for the District of Nebraska, within the Eighth Judicial Circuit, at the September, 1914 Term of the District Court of the United States for the District of Nebraska, Norfolk Division.

Be It Remembered, That on the 22nd day of September, 1908, there was filed in the Clerk's office of the United States District Court, District of Nebraska, Norfolk Division, a Bill in words and figures following, to-wit:

United States of America,
District of Nebraska.

In the Circuit Court of the United States of America for the State of Nebraska, Sitting at Norfolk, Nebraska.

John H. Friederichsen, Complainant,
vs.

Edward Renard, in His Own Right and As Agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore,
Defendants.

Bill of Complaint.

United States of America,
District of Nebraska.

John H. Friederichsen, Complainant,
vs.

Edward Renard, Mary C. Gilmore & W. J. Gilmore, Defendants.

In the Circuit Court of the United States for the State of Nebraska, Sitting at Norfolk, Nebraska.

To the Honorable Judges of the Circuit Court of the United States of America, for the State of Nebraska.

2 Your complainant, John H. Friederichsen, who is a resident and citizen of the State of Virginia, brings this his bill of complaint against Edward Renard, in his own right and as agent for Mary C. Gilmore & W. J. Gilmore and Mary C. Gilmore and W. J. Gilmore, each of whom is a resident and citizen of the state of Nebraska.

And Thereupon, your orator humbly complaining, wishes to show unto this Honorable Court the following state of facts and circumstances.

That your complainant was born in the Empire of Germany and emigrated to the United States of America some twenty years ago, finally settling in the County of Knox, in the State of Nebraska, in which County and State he remained, as a citizen and subject of Germany until theday of....., 19.., at which time, and in accordance with the laws of this land, by decree of a competent court having jurisdiction, he was made, and from that time became, a citizen of these United States of America by naturalization. A copy of said decree of naturalization is herewith filed marked Exhibit "A" and prayed to be read and treated as a part of this bill of complaint.

That coming from amongst the masses of the German Population, and having few advantages, complainant's education was necessarily very [me-gre], and that acquired was mainly derived from hard experience. That complainant has a family consisting of a wife and nine children, all of whom are under the age of twenty-one, and all but one of whom is entirely dependent upon him for maintenance and support.

That by studiously applying himself, and by hard and continuous labor your complainant, in the course of years [emassed] and saved, what to him, in his humble station in life, was a considerable fortune, consisting chiefly of lands in the County of Knox, Nebraska, and live stock hereinafter more particularly set out and described.

3 That during the year 1901, on the 8th day of October, your complainant entered into a written contract with W. D. & A. M. Day and wives for the purchase of the herein-after described real estate, situate, lying and being in the County of Knox, in the State of Nebraska, which said contract is of record in Knox County Clerk's office, at Center, Nebraska, [Missaleneous] Record [Boob] No. 8, page 314, in which contract your complainant agreed to purchase, for the sum of \$8,400, to be paid as set out in said contract, a tract of 240 acres of land. A copy of said contract is herewith filed marked Exhibit "B" and prayed to be read as a part of this bill of complaint: together—with an assignment thereunder, assigning all right, title and interest thereunder to Edward Renard of the town of Bloomfield, Knox County, Nebraska, which said assignment is prayed to be read in connection with said contract and as a part of this bill of complaint, heretofore filed as part of Exhibit "B" above.

That on February 25th, 1905, W. D. and A. M. Day and wives, conveyed the property covered by the said contract of purchase (Exhibit "B" above), and assigned as therin set forth, to N. A. Rainbolt by a general warranty deed, but conveyed subject to the outstanding contract of purchase, which conveyance was for the sum of \$1000.00. A copy of said deed is herewith filed, of record in Knox County Clerk's office D. B. 30, page 591, as Exhibit "C" and is prayed to be read as a part of this bill.

That all during the period covered by the above contract of purchase, and long before the date of the same, your complainant was endeavoring and striving to become the owner of the real estate covered by said contract, although at one time, he had to assign his rights under the same. The fact is,
4 that the desire to become a land owner, and to own the particular land covered by the contract of purchase was one of the dominating desires of your complainants simple, but honest and confiding existence.

That your complainants hopes, longings and desires were at last realized, when, on the 25th, day of February, 1905, he became the owner by purchase from N. A. Rainbolt and wife, and in accordance with the terms of the aforesaid contract of purchase, although the same had been assigned, and in consideration of the sum of \$8,400. cash paid; of the following real estate conveyed to him by a fee simple deed with general warranty; to-wit, the North East Quarter (N. E. $\frac{1}{4}$) of Section (6) and the North Half (N. $\frac{1}{2}$) of the North West Quarter (N. W. $\frac{1}{4}$) of Section Eight (8) all in Township Twenty-Nine (29) North Range Three (3) West of Sixth Principal Meridian, situate, lying and being in the County of Knox, in the State of Nebraska and containing 240 acres, which deed [if] of record in Knox County Clerk's office, Center Nebraska D. B. 33, page 296, a copy of which is herewith filed marked Exhibit "D" and prayed to be read as a part of this bill.

That your complainant procured from Edward Renard a Quit Claim deed to the aforesaid real estate, which [—] dated October 8th, 1901, in which deed the said Edward Renard relinquished all right, title and interest to said property by virtue of the assigned contract of purchase, which said Quit Claim deed is of record in Knox County Clerk's Office Center Nebraska D. B. 33, page 296, a copy of which is herewith filed marked Exhibit "E" and is prayed to be read as a part of this bill.

That at this time your complainant was the owner in fee simple, free from incumbrance, of the aforesaid 240 acres of Knox County lands, situated near the town of Bloomfield Nebraska and valuable, not only for its fertility, but
5 also and especially, because of its proximity to Bloomfield, Nebraska, a growing and prosperous town, which caused complainant's lands to [grown] daily in valuation and made [then] most desirable. That at the present time, the 240 acres of land above described, instead of being worth \$35.00 per acre or \$8,400.00, the amount complainant gave for same, the land is worth \$70.00 per acre or approximately \$17,000.00 having increased in valuation 100% in the short space of three years.

That up to this time, your complainant being [as] uneducated person with small—practically speaking—with no business capacity or qualifications, had in every way placed the utmost confidence in Edward Renard—that his advice had been given, taken and followed by your complainant in matter of business; that complainant's business had, in a manner, been almost entirely entrusted to his care, especially his transactions in regard to the purchase of complainants real estate; that complainant did his business with and through the Citizen State Bank of Bloomfield, Nebraska, of which institution the said Edward Renard was President and in which he was largely interested; that the said Edward Renard, as a matter of fact, was better versed and acquainted, either individually or through his connection with the aforesaid bank, with complainant's business affairs than complainant himself, and that the said Edward Renard, shrewdly and consistently, with a motive in view, gained and secured the implicit confidence of your complainant, until he practically occupied the position of a self constituted trustee, which confidence and position, as [well] hereinafter more particularly appear, he has so basely and outrageously abused and misused, and by and through which, together with other circumstances, inaugurated by himself, or at least known to him and taken advantage of by him, he has intentionally, willfully, designedly, craftily and wrongfully cheated, defrauded and robbed your complainant out of almost his entire estate so laboriously acquired by so many constant years of toil, hardship and privation.

That on October 23rd, 1900 C. H. Gates and Ida May his wife, W. F. Gates (who is a brother-in-law of the aforesaid Edward Renard) and Isabella Smith conveyed a tract of 296 acres of land situated in Louisa County, in the State of

Virginia to Mary C. Flatt of Dixon, Ill., and the mother-in-law of the aforesaid Edward Renard, in consideration of the sum of \$3,500.00 of which amount \$1,500.00 was cash in hand paid, and the balance secured to be paid by a mortgage upon the property, said property however being conveyed to a certain extent, in trust to free the same from the claims of any husband of the said Mary C. Flatt, either past, present or future, she having been married once before the Flatt marriage, and twice since the same. The said property is described in said conveyance as follows: All that certain tract, piece or parcel of land, situate, lying and being in the County of Louisa, State of Virginia, on both sides of the main County road leading from Louisa to Treviliars depot adjoining the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandemark, Henry & Isaac Poindexter, Elias Jackson and Chas. Danne Jr., and being a part of the lands of which the late A. A. Gates died seized and possessed, known as "Walnut Shade" and containing 298 acres, be the same more or less, which said deed of conveyance and the mortgage to secure the deferred payments, consisting of two bonds for \$1000.00 each payable in one and two years to C. H. Gates, are of record in Louisa County Clerk's Office D. B. 20, pages 76 & 77, copies of which are herewith filed marked Exhibits "F" & "G" and are prayed to be read as a part of this bill.

7 That the said Edward Renard, the son-in-law of the said Mary C. Flatt (she being in poor financial circumstances) in some manner, by promises, loans or advances, your complainant cannot state how or in exactly what manner, as there is no recorded evidence of the same, became and was a creditor of his mother-in-law, who is at this time Mrs. Mary C. Gilmore, in a large amount, and the said Mary C. Gilmore, having no property except the Virginia lands above described, and having no income or way of curtailing or paying whatever debts and liabilities she had contracted with the said Edward Renard or any one else, and the mortgage on the said Virginia lands of \$2000.00, by reason of the depreciation of the property and the constant pillaging of the little timber which was on the place, being all the same was worth, and probably more than the real value of the property, it became necessary for the said Edward Renard, in order to extricate himself from his unwise investment, or to wipe out and liquidate the money his said mother-in-law owed him; to secure a purchaser for the said Virginia property at a price far in excess of its real valuation, or, having an option or some kind of an agreement or un-

derstanding with his mother-in-law, not only to wipe out the existing differences between them, but if he could, by fraud or in any manner what-soever, provided it [accomplished] the desired end, make a large amount for himself by making sale, exchange or advantageous disposition of the said Virginia lands.

That in order to extricate himself from his dilemma, whatever the same was, or in what way he became implicated, your complainant is unable to say, only charging that he was implicated in some way with his said mother-in-law, or acting in pursuance of some understanding with her, the said Edward

Renard went to work, and as it has developed since,
8 singled out your complainant for the victim of the out-

rageous fraud which has been perpetrated upon him, by the use of fraud, misrepresentations, undue influence, [coertion] and [deceipt], or with a combination of all and by various and sundry other modes and methods, resulting in complete and absolute ruin to your complainant.

That in [pursuanse] of the premeditated design and intent on the part of the said Edward Renard, the following facts and circumstances occurred and transpired.

That in the spring of 1908, the said Edward Renard; knowing the implicit confidence which your complainant reposed in him; knowing also that he practically occupied the position of a self constituted trustee in respect to your complainant; also knowing your complainants ignorance and lack of education and business qualifications; knowing further that your complainant had been adjudged a person of un-sound mind on February 22nd, 1902, and had been confined in the State Asylum from that time until the 27th day of September, 1902, (a period of over seven months), as will appear from a certificate of the Clerk of the District Court of Knox County Nebraska, and Ex-officio Clerk of the Board of Insanity of Knox County Nebraska, duly certified, here-with filed marked Exhibit "H" and prayed to be read as a part of this bill; also knowing that your complainant's lands were valuable, being exceedingly fertile and well located and that the same were daily growing in value; knowing further that your complainant was absolutely ignorant in regard to fertility, value and conditions of Virginia lands, Virginia climate conditions and customs and knowing your complainant would rely on any statements he should see fit to make, the said Edward Renard, not apparently for himself, but to conceal his real intent and purpose,
9 acting and calling himself the agent of his mother-in-law and her husband, Mary C. Gilmore and W. J. Gil-

more, and so far as complainant knew at the time, being a thoroughly disinterested party to the transaction, approached your complainant with a proposition that complainant make a trade with parties in the State of Virginia, trading complainant's place in Knox County Nebraska for the place of Mary C. Gilmore and husband in the County of Louisa, State of Virginia. That the trade would be made on the basis as follows: [Valu-ing] complaints Nebraskan lands at \$70.00 per acre and Mrs. Gilmore's Virginia lands at \$42.50 per acre.

That your complainant was averse to making any such trade or exchange, although, the said Edward Renard insisted that the same was a good and advantageous bargain for your complainant, and that the said Edward Renard, in order to induce your complainant to enter into a certain agreement, hereinafter filed, and with the intent and purpose of cheating and defrauding your complainant, stated the following facts to your complainant in regard to the Virginia lands, the making of each and every one of which statements is expressly charged to be true.

First. That the same consisted of 300 acres, when no deed to the property describes the same as more than 298 acres, if there is in fact that much, which facts the said Renard knew, and which was made to defraud and mislead your complainant—that even as the trade was made the difference of two acres was a sum of \$85.00 in complainant's favor which was never adjusted in the trade as made—complainants business capacity not being adequate to observe the error and have the same rectified, and as he was being defrauded the small sum of \$85.00 would make no material difference.

10 Second. That the Virginia lands were worth \$55.00 per acre, but that the Virginia parties (Mrs. Gilmore and husband) would take \$42.50 per acre for them in the exchange as the place had not been cultivated for the [part] two years, which statement was false and fraudulent, and made with the intent to deceive complainant, when as a matter of fact the Virginia lands are not worth at the outside over \$5.00 per acre and the same, or the major portion of the same have not been cultivated for years and years, and then only for a short time and in patches, which facts were well known to the said Edward Renard.

Third. That 200 acres of the Virginia lands were fallowed two years back and ready for cultivation, when as a

matter of fact there has never been a time when 200 acres of land, on the Virginia place, was or could have been cultivated, the same was not fallowed nor ready for cultivation, but instead, the greater portion of the, so called, cleared land was grown up in bushes, shrubs, [scrubb] pine & oaks, of no value whatever, broom straw, sassafras bushes and [weeds], necessitating, in order to cultivate the same at all, the grubbing of almost the entire place at a tremendous expense, and even after redeemed of very little value, all of which facts were well known to the said Edward Renard, and which were represented in order to defraud your complainant out of his valuable property.

Fourth. That there was 100 acres of original growth Virginia pine or timber on the place which would pay for the same, of course at the valuation the said Renard had fixed, twice over, which statement was made by the said Renard, knowing the same was false at the time and made with intent to defraud and cheat complainant, as there is absolutely no timber on the place which is worth having except for fire wood, all timber which was ever of any account on the place having been removed and severed so that even the cutting of a few rail road ties would be almost an [impossib-ility].

Fifth. That the Virginia lands would produce from 50 to 75 bushels of corn to the acre, which statement was made, knowing the same to be absolutely false and fraudulent and made with the intent to mislead your complainant, as 40 bushels to the acre is a good yield in the section, and 50 bushels a large yield from the best Virginia lands well fertilized at a large expense and that a yield of 20 bushels to the acre is almost an [impossib-ility] from any land on the Virginia place put off on your complainant by fraud.

Sixth. That the Virginia lands would produce from 20 to 40 bushels of wheat to the acre, which statement was utterly false and fraudulent, made so knowingly with the express intent to mislead your complainant, as 15 bushels to the acre is the average yield and 20 bushels a large yield from the best lands in the section, well fertilized at a large expense and that 10 bushels to the acre would be a large yield from any land on the said Virginia 298 acre place, now in complainants possession.

Seventh. That the Virginia lands would produce from 50 to 60 [acres] of oats to the acre, which statement was absolutely false, made with intent to deceive complainant, knowing its falsity as 30 bushels to the acre is a large yield from the

best lands in the section, well fertilized, and complainant charges that he cultivated 6 acres of oats this spring, (1906) and hauled oats, straw and all from the [whold] six acres of land to the barn at one two horse wagon load, and that the lands traded him are absolutely worthless as a farming proposition of any sort and a man cannot make even a bare living on the Virginia place of 298 acres by farming the same, all of which was well known to the said Edward Renard at the time the statements were made.

12 Eighth. That the timber lands were all in blue grass which would pasture from 40 to 45 head of cattle all the year round, which statement was absolutely false, made so knowingly with intent to defraud complainant as there is [posse-tively] not a sprig of blue grass on the entire property, unless the yard grass is blue grass, and grass of no kind in the woods, such as they are, and provided they deserve such a name, and that this section of the country is not even a blue grass section and there is little, if any at all, in the whole of the County of Louisa Virginia.

Ninth. That the Virginia lands were free from rocks and stones, which statement was utterly false, made so knowing its falsity with intent to mislead and deceive your complainant, as the whole of the Virginia place abounds in rocks and stones of every description, size and character, surface rocks and others.

Tenth. That there was a gravel bed in one corner of the timber lands which was valuable, which statement, out of the whole number made, is, your complainant charges and alleges, true in one particular—the [existance] of the gravel bed—but the same your complainant charges and alleges, is not located in the wooded part of the place and is of no value whatever—gravel selling for .15c per wagon load and complainant alleges further that there has not been over three or four loads of gravel sold from the place for the tremendous sum of 15c per load for five years, that there is no demand for anything of the kind, that the same is 13 of no real value, not being worth at the outside over \$100.00, and even if it were, the bed is small and very shallow.

Eleventh. That the whole place was enclosed with a four [stran-] wire fence, which statement is absolutely false and made so knowing it was false with intent to defraud and mislead your complainant, as there is not over half mile of effective [feicing] around the whole place of 298 acres, and complainant charges and alleges that the whole place of 298 acres

has never been entirely fenced in, unless it was done some 15 or 18 years back but that there is no evidence of a fence ever having been around the whole place at the present time, in fact, a large part of the place is what they call, "out on the commons."

Twelfth. That the whole place was a red clay soil which was very fine in this section, which statement was absolutely false and fraudulent, made so knowingly with intent to mislead complainant, as there are a half dozen different kinds of soil on the property, none of which are good, but some worse than others, but that the red clay soil is the poorest of all and is absolutely worthless for any use yet discovered, or which your complainant believes ever will be discovered.

Thirteenth. That there was a five acre orchard on the place, which statement was absolutely false and fraudulent, made knowing the same was false and with intent to defraud your complainant—that there is an orchard on the place but the trees in same are small and hide bound and will never amount to anything, the same covering at most not over two acres of ground—that there are a few trees outside of this orchard some twenty or twenty five.

Fourteenth. That there was 30 acres of timothy and clover hay on the place which would cut from 3 to 5
14 tons to the acre, which statement was absolutely false and fraudulent, made so knowingly and with intent to deceive your complainant as there is not a sprig of timothy or clover hay on the entire place, and if there were, the same would not cut anything like 3 to 5 tons to the acre, even from the best lands in this section, and on the place put off on complainant it is not a question of how many tons an acre will cut, but rather how many acres it will take to cut a ton of timothy and clover hay.

Fifteenth. That adjoining lands were worth from \$50.00 to \$60.00 per acre, which statement was absolutely false and fraudulent, made knowing its falsity with intent to deceive complainant and knowing that he would rely on, and believe the same, as most any of the adjoining lands can be purchased for from \$4.00 to \$5.00 per acre exclusive of timber and buildings, and even with timber and buildings for from \$8.00 to \$10.00 per acre.

Sixteenth. That there was a barn on the property 60 feet by 64 feet with a basement which would accommodate 40 cows, which statement was false, fraudulent and untrue, made knowing its falsity for complainant to rely on and with intent

to deceive and mislead complainant, as the barn, in its [delapidated] condition and such as it is, is only about 30 feet by 40 feet, and the basement, which is practically no good will not hold 20 cows packed in like [sardines.]

Seventeenth. That there was a twelve room dwelling house, painted new last fall with a cellar or basement, all in good condition, which statement was absolutely untrue and fraudulent, made knowing the same was untrue with the express purpose and intent for complainant to rely on, and on which complainant did rely, as well as on every other 15 false and fraudulent statement made to him—that the dwelling house has the number of rooms named, counting closets and garret, but that the same is in a [delapidated] condition, has no cellar at all and has never been painted since the same was built.

Eighteenth. That complainant could dispose of everything he raised on the farm to good advantage, butter selling [from] .45c per pound and eggs for .45c per doz.—which was false and untrue and made so knowing it was false and untrue with intent to mislead complainant, as butter sells rarely for over .25c per pound and eggs rarely for over .25c per dozen and a large part of the time butter sells for .18c and eggs for .15c.

Nineteenth. That the place was located only 40 miles from Washington, D. C. and only 1 & 1/2 miles from Louisa, both of which statements were false and fraudulent, made so knowing that the same were false and fraudulent with intent to deceive complainant, as the place is over 100 miles from Washington, D. C. and at the closest, 2 miles from Louisa, Va.

Twentieth. That \$300.00 worth of machinery, a blacksmith outfit, a cow and hog would be left on the place for complainant, which statements were false and fraudulent, made so with intent to defraud complainant and knowing that the same were untrue and that the property would not be, and had never been on the place—that complainant charges and alleges that Mrs. Mary C. Gilmore has never had \$300.00 worth of machinery on the place belonging to her, and has never at any time had a blacksmith's outfit belonging to her on the place—that the cow was there when complainant took charge but was claimed by W. J. Gilmore and complainant allowed him to take same, and that complainant thinks 16 he got one hog although he may be mistaken.

Twenty-First. That the said Edward Renard further represented to complainant that one man in Virginia could do as much work as three in Nebraska as he would be able

to work all the year round, which [stat-ment] complainant relied on and believed, being as stated above, absolutely ignorant of climatic conditions in Virginia, and which he has found out is absolutely false and fraudulent. That the said Renard also represented to complainant that the climate was a most healthy one, which may be the case, but one of your complainants sons, his oldest one, and his dependance, has had to return to the State of Nebraska on account of bad health resulting from the change of climate.

That each and every one of the above, and many other [stat-ments] and representations were made to your complainant, too numerous to mention, not one, a few or many of which were false, but each and every one of which were false and fraudulent made with the express intent, purpose and design to influence your complainant and to defraud him and cheat him out of his property and estate, and on each and every one of which your complainant relied and trusted and on which the said Edward Renard knew your complainant relied and trusted, and knew also, at the time the several [stat-ments] were made that the same were false and untrue, fraudulent and misleading and made with a view of [inflnincing], cheating and defrauding your complainant out of his estate.

That the said Edward Renard has been in the State of Virginia, in Louisa County Virginia, and on the particular 298 acres of land which he misrepresented to your complainant, and that he knew that his [stat-ments], representations and specifications were fraudulent and untrue at the 17 time of making the same, that he has been interested in

Virginia farming lands located in Louisa County other than the 298 acres above and knows the values of the same—that he knew personally, and not by hearsay, the condition of, and [mature] of, the place he was misrepresenting to your complainant and knew full well that his mother-in-law and her husband would bear him out in his fraudulent, misleading and extravagant [stat-ments] if the same became necessary, which, although not necessary as your complainant was completely defrauded and deceived, they afterwards did do.

That even in the face of all of the above [stat-ments] and representations your complainant was still averse to making the exchange, wishing to avoid the trouble of moving at a large expense, and not being desirous of leaving all acquaintances and friends made from a long and prosperous sojourn in Knox County Nebraska and going into a strange land

amongst strange people, so that, in order to carry out and [consum-ate] the fraud begun, and to the end that complainant should be cheated, defrauded and robbed, the said Edward Renard, your complainant alleges and charges, either inaugurated by and through his henchmen, or there was inaugurated from some unknown reason and at this particular time, and the said Edward Renard knowing of the same took advantage of the situation, the following unusual, unlawful, and unheard of condition of events.

That night after night, at the time the said Renard was attempting to get your complainant to agree to make the exchange as above set forth, complainant and his family and property were [harrassed] and disturbed—night after night, sometimes two nights apart, complainants stables and barns

were broken into and his horses and cattle attempted
18 to be stolen, that night after night there was shooting
in and around complainants premises and that after
an oft repeated visitation of the nature above set out your
complainant, being in a quandary as to the meaning and
reason for the molestation, and finally almost frantic with
fear and apprehension, not knowing how to protect himself
against a hand which struck in the [the] dark, appealed to
the local authorities for assistance and counsel. That during
the continuation of these events your complainant was
almost besides himself and ready to go mad from fright as
well as his entire family, and that in these circumstances, and
while complainant and his family were being molested from
night to night, the said Edward Renard procured from your
complainant and his wife an agreement and contract to make
the trade and exchange which he had been working on for a
long time, and in connection with which he had made so
many fraudulent, untrue, misleading and [exag-erated]
[stat-ments] to your complainant.

That, strange to say, immediately after the signature of the aforesaid agreement, which is dated March 12th, 1908, and is hereinafter set out, the molestation of complainant his family and property ceased and determined, subsiding and stopping as suddenly and unaccountably as the same had begun, without cause or reason, as your complainant then viewed the situation.

That on February 24th, 1908 complainant and his wife executed a mortgage on the aforesaid 240 acres of Nebraskan property to secure to Edward Renard the payment of a [cap-

on] [promis-ory] note for \$5000.00 of even date with mortgage, payable March 1st, 1910 at the Chemical National Bank, N. Y. City, [interese] until maturity at 5% and after maturity at 10%, which said Mortgage is of record in Knox County Clerk's Office, Center Nebraska, Mortgage Book No. 14, page 440 a copy of which is herewith filed marked Exhibit "I" and prayed to be read as a part of this bill.

That on March 24th, 1905, your complainant and his wife executed a mortgage on the aforesaid 240 acres of Nebraskan property to secure to T. H. Crahan, (and the partner of Edward Renard, or Vice President of the Citizens State Bank of Bloomfield, Nebraska) the sum of \$3345.69 evidenced by a promissory note due February 24th, 1906 with interest at 10% from maturity payable at the Citizens State Bank of Bloomfield, Nebraska, which said mortgage is [or] record in Knox County Clerk's Office, Center, Nebraska, Mortgage Book No. 11, Page 356, the original of which is herewith filed marked Exhibit "J" and prayed to be read as a part of this bill.

That the agreement of March 12th, 1908, procured as aforesaid, was between John H. Friederichsen, your complainant and Adola Friederichse, his wife, of the first part and Clara Gilmore (being Mary C. Gilmore) and W. J. Gilmore, and Edward Renard, their Agent of Louisa County Va., of the second part. That under said agreement complainant and his wife agreed, not to convey to Clara Gilmore and husband, but to Edward Renard the Agent of Gilmore and husband, the 240 acres of aforesaid property by March 20th, 1908 only 8 days from the date of the agreement, making it impossible for your complainant to make a trip to Virginia and find out what he was getting in the trade even if the said Edward Renard should allow him to attempt such a thing, and providing further that Gilmore and husband could furnish a deed to the Virginia lands as late as July 1st, 1908,

a period of more than three months during which time

complainant would have title to no property at all—but

as stated before, such was your complainants implicit confidence in the said Renard that he never for a moment questioned the transaction or the way the same was being carried out. The contract further stipulates that complainants 240 acres of Nebraskan land were to be valued at \$16,800.00 and that he was to assume the payment of the two mortgages on the same, naming them as a \$5,000.00 first mortgage and a \$2,500.00 second mortgage when in fact the second mortgage was for the sum of \$3345.69 as will appear

from Exhibit "J" above, and that the Virginia lands consisting of 300 acres should be valued at \$12,750.00 "and difference paid Clara Gilmore agrees to take mortgage for \$4,000.00 at 5% for 8 years as payment of consideration" which said last mentioned clause your complainant can not explain, any more than he can the whole transaction—he is absolutely ignorant of how the same was worked out or on what basis the same was made other than the valuation of the lands, a carbon copy of said agreement is herewith filed marked Exhibit "K" and is prayed to be read as a part of this bill.

That in compliance with the said agreement of March 12th, 1908, and by direction from Edward Renard your complainant paid up, in cash out of his own funds, the \$3345,— mortgage and procured from F. H. Crahan the beneficiary under the same a release deed, releasing the same, which deed is of record in Knox County Clerk's Office, Center, Nebraska, under the head of Releases, Book 21, page 90, a copy of which is herewith filed marked Exhibit "L" and prayed to be read as a part of this bill.

That in furtherance of said agreement of March 12th, 1908, your complainant paid to Edward Renard the sum of \$5,000.00 to take up and pay off the \$5,000.00 first mortgage held by the said Renard on the property, but that the said

21 mortgage is not released and complainants note has never been delivered to him—that in answer to inquiry about the same the excuse given for not releasing the same and returning complainants note is contained in a letter from F. H. Crahan dated July 8th, 1908, herewith filed marked Exhibit "M" and prayed to be read as a part of this bill—in which letter Crahan states "In regard to the loan on the land we cannot get that motg. until it is due—the land is good for it and you do not need to worry about it". showing that the same has been paid by complainant and that he is entitled to the return of his note and a release from any liability in the premises.

That in pursuance of said March 12th, 1908, agreement complainant and his wife conveyed the said 240 acres of Knox County land to Edward Renard on the 19th day of March, 1908, or seven days after the execution [—] said agreement, by a deed with general warranty, agreeing therein to assume the payment of the \$5,000.00 mortgage, and not any agreement about the \$2,500.00 or \$2345.69 mortgage as the same had been taken up by complainant at that time, which deed is of record in Knox County Clerk's office, Center.

Nebraska, as of March 20th, 1908, D. B. 37, page 346, a copy of which is herewith filed marked Exhibit "N" and prayed to be read as a part of this bill.

That on March 19th, 1908, Mary C. Gilmore and W. J. Gilmore executed a deed to complainant, conveying the aforesaid Virginia property containing 298 acres which deed recited the consideration as \$12,750.00 cash in hand paid, and which deed is of record in Louisa County Clerk's Office, Louisa, Va., D. B. 26, page 232, the original of which is herewith filed marked Exhibit "O" and is prayed to be heard as a part of this bill.

22 /That on Mar. 19th 1908 John H. Friederichsen, your complainant and his wife executed a deed of trust on the Virginia 298 acres of land aforesaid to secure to Mary C. Gilmore a bond for \$4,000.00, it being a coupon bond dated March 19th 1908 with interest from date at 5%, payable annually, bond payable March 19th, 1916, which said deed of trust is of record in Louisa County Clerk's Office, Louisa Virginia, D. B. 26, page 231, a copy of which is herewith filed marked Exhibit "P" and prayed to be read as a part of this bill, and that the aforesaid C. H. Gates who held the mortgage on the Virginia lands to secure himself the payment of the two \$1,000.00 bonds set out heretofore had assigned his interest thereunder to one Jason C. Ayres and that the said Jason C. Ayres held a [chattle]mortgage, on the furniture of Mary C. Gilmore to secure himself in the sum of \$4,000.00, which amount represented in part and included the two C. H. Gates notes for \$1,000.00 each—that this said [chattle] mortgage was unpaid and unsatisfied at the time of the exchange of properties herein set out, and that on the 24th [ad-] of April 1908, the said Mary C. Gilmore and W. J. Gilmore her husband, by deed of conveyance of record in Louisa County Clerk's office D. B. 26, page 233, herewith filed marked Exhibit "Q" and prayed to be read as a part of this bill, assigned and transferred to Jason C Ayres all their right and title under the trust deed executed by your complainant and wife to secure the said Mary C. Gilmore the sum of \$4,000.00 filed above Exhibit "P"—to which reference is herewith made, and that the said Jason C. Ayres on June 6th, 1908 executed a release deed releasing all claim in the chattel mortgage of record in Louisa County Clerk's Office, Louisa Va. D. B. 26, page 234, a copy of which is herewith filed marked Exhibit "R" and is prayed to be read as a part of this bill.

23 That the aforesaid Edward Renard, acting as the Agent of Mary C. Gilmore and W. J. Gilmore, and the said Mary C. Gilmore and W. J. Gilmore, themselves and through their agent, individually and collectively, having completely cheated, defrauded, robbed and divested your complainant of his estate, which is so valuable, induced him and advised him to make sale of his effects by public auction and go to his Virginia Home without delay which your said Complainant did, leaving Knox County Nebraska for Virginia on or about the first part of April 1908, moving his entire family and some of his effects, and that from the 8th, or 9th day of April, 1908, your complainant has been a citizen and resident of the State of Virginia, living and residing on the aforesaid 298 acres of Virginia land.

That your complainant wishes to expressly charge the following facts. That such was his confidence in the aforesaid Edward Renard that not a single transaction mentioned and set out in the foregoing bill was questioned. That your complainant has set out and detailed each and every transaction to the best of his ability, but that in his ignorance as to the exact and detailed facts and circumstances in this matter he is "at sea," as well as his counsel, he being absolutely uninformed, all of which shows his absolute dependence on the fair dealing of the aforesaid Renard and Gilmore. That Complainant has tried in every way since reaching Virginia to verify the statements made to him in connection with the exchange but has utterly failed in each and every attempt, and at this late day realizes for the first time how completely he has been swindled, cheated, robbed and defrauded, and that he was packed off to Virginia a distance of some 1500

24 miles on the supposition that being financially ruined, absolutely unknown and extremely ignorant and unlearned he would never be heard of again and the feast among his [dispoilers] would be [carn], peaceful and uninterrupted.

That complainant wishes to show further to this Honorable court the following facts.

That by virtue of the public auction of his effects before leaving Nebraska to come to Virginia, he suffered a large loss, the sale amounting to nearly \$3,000.00 and his effects going at the lowest estimate, at 25% beneath their real valuation—the buyers knowing that he was obliged to sell the same—That his [-reight] bill and expense of moving to Virginia amounted

to something like \$1,000.00 and that he has, in trying to work an almost worthless property in Virginia, shoved off on him as above set forth, he has expended in improvements, machinery and labor in the neighborhood of \$3,000.00 which sum is almost an absolute loss to him as the machinery purchased is of no use to him and the land, under the best cultivation complainant could give it does not yield a profit. That the above and many other expenses have been incurred, and expenditures made by your complainant, each and every one on account of the fraud of Edward Renard, Mary C. Gilmore and W. J. Gilmore, and from which complainant will derive no benefit or advantage. That complainant left on his 240 acre place 8 acres of Alfalfa, 5 acres of timothy and clover hay, 8 acres of broom grass and 30 acres of [pararie] hay from all of which the said Edward Renard, Mary C. Gilmore and W. J. Gilmore have derived advantage and profit. That his lands were ready for spring crops with the exception of the oat stubble which was not plowed—that there were two new cattle yards left on the premises and that the place is now being rented for a rental of \$600.00 a year, and as
25 your complainant is informed, for the period of five years.

That your complainant is now in want and is absolutely ruined by reason of the frauds and circumstances heretofore narrated and set out.

All of which acts, doings and pretenses of said defendants, and each and every one of them, are contrary to equity and good conscience and tend to the manifest wrong injury and oppression and ruin of your orator in the premises. In tender consideration whereof, and for as much as your orator is entirely remedyless by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, make a full disclosure and discovery of all matters heretofore stated and charged (but not under oath, an answer under oath being hereby expressly [waives] that this complainant says he stands ready and willing to do right and equity in the premises, and as doing so, hold the said Virginia lands, which have been conveyed to him as aforesaid, subject to such orders of this Honorable Court as to it shall seem right and equitable, and is willing and ready to convey and deliver back the

same to the grantees, or to any one whom the court shall direct, and for such purpose will produce a conveyance to the same in open court whenever this Honorable Court shall so order.

Your orator prays—

First. That a full and complete disclosure be had from Edward Renard, Mary C. Gilmore and W. J. Gilmore, setting forth all and every transaction and dealing of each and every of said defendants with respect to the said false and fraudulent exchange and trade of properties aforesaid—showing each and every act and transaction in detail.

Second. That the said contract of March 12th, 1908 between your orator and wife and the defendants agreeing to the exchange of properties, be declared and decreed fraudulent, null and void and of no force, effect or virtue.

Third. That the aforesaid deed from your orator and wife to Edward Renard, dated March 19th, 1908, conveying the said 240 acres of Knox County Nebraska lands, be declared and decreed null and void, of no force and virtue and that the same be cancelled and set aside as fraudulent.

Fourth. If necessary, that such reconveyances be directed and had as to the Court may seem just, equitable and proper and your orator again invested with the Knox County Nebraska lands of which he has been fraudulently divested.

Fifth. That a decree be rendered against each and every of said defendants in favor of your orator for such damages as your orator has sustained by reason of the frauds and misconduct of said defendants in the premises, which amount will be ascertained by referring the matter to one of the Commissioners of this court or by an issue out of chancery to be tried at the bar of this court, or as directed, and that all proper account be taken and had and all proper disclosures made.

Sixth. That all such other, further and general relief may be decreed your orator as the nature of his case may require and to this Honorable Court may seem meet and proper.

[—]

27 Eighth. And may it please your honors to grant unto your orator a writ of subpoena of the United States of America, directed to the defendants Edward Renard, in his own right & as agent for Mary C. Gilmore & W. J. Gilmore,

Mary C. Gilmore and W. J. Gilmore, commanding them and each of them, on a day certain, to appear and answer this bill of complaint, and to abide by and perform such order and decree as to this court shall seem proper, and required by the [principles] of equity and good conscience, and your orator will ever pray & etc. Let Sub- go, and etc.

W. C. BIBB.

Prepared by W. C. Bibb of
Bibb & Bibb, Louisa Va.

28 (Subpoena in Chancery and Marshal's Return, filed
in the Circuit Court on October 6, 1908.)

United States of America, District of Nebraska, Norfolk
Division.

The President of the United States of America; To Edward Renard, in his own right and as agent for Mary C. Gilmore & W. J. Gilmore, and Mary C. Gilmore and W. J. Gilmore—Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States for the District of Nebraska, on the first Monday of November next, at the city of Norfolk, then and there to answer the Bill of Complaint of John H. Friederichsen this day filed against you, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of September, 1908. Issued at my office in the city of Norfolk, under the Seal of said Circuit Court, the day and year last aforesaid.

(Seal)

GEO. H. THUMMEL, Clerk.
By O. F. Granel, Deputy.

Memorandum: The above named defendants to enter their appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

GEO. H. THUMMEL, Clerk.
By O. F. Granel, Deputy.

J. H. Berryman,
W. V. Allen,
Complainants [Solicitor].

29 District of Nebraska—ss.

I hereby certify and return that on the 30 day of Sept., 1908 I received this Chancery Subpoena, and on the 1 day of Oct. 1908, I served the same upon the within named Edward Renard, as agent for Mary C. Gilmore and W. J. Gilmore at Bloomfield, in Knox County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

WM. P. WARNER,
United States Marshal for the
District of Nebraska.

By John F. Sides,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return that on the 30 day of Sept., 1908 I received this Chancery Subpoena, and on the 1 day of October, 1908, I served the same upon the within named Edward Renard at Bloomfield in Knox County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

WM. P. WARNER,
United States Marshal for the
District of Nebraska.

By John F. Sides,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return that on the 30 day of Sept., 1908 I received this Chancery Subpoena, and on the 2 day of October, 1908, I served the same upon the within named Mary C. Gilmore and W. J. Gilmore at Wayne, in
30 Wayne County, State and District of Nebraska, by delivering to and leaving with each of them a certified copy thereof, with all the indorsements thereon.

WM. P. WARNER,
United States Marshal for the
District of Nebraska.

By John F. Sides,
Deputy United States Marshal.

Answer of the Defendant Edward Renard.

Filed in the Circuit Court on December 29, 1908.

This defendant, Edward Renard, now and at all times hereafter, saving to himself all and all manner of benefit of exceptions or otherwise, that can or may be had, or taken to the many errors, uncertainties and imperfections in said bill of complaint, for answer thereto or so much thereof as this defendant is advised is material or necessary for him to make answer thereto. Answering, says. The defendant Edward Renard admits that the complainant John H. Friederichson, is a citizen of the state of Virginia, that he was born in the Empire of Germany and became a citizen of the United States of America, by naturalization; that the complainant has a wife and family consisting of nine children all under twenty one years of age; that on the

25th, day of February 1908, he became the owner
31 and had conveyed to him by deed, the northeast
quarter (NE $\frac{1}{4}$) of Section six (6), and the north half
(N $\frac{1}{2}$) of the northwest quarter (NW $\frac{1}{4}$) of section eight
(8), all in township twenty-nine (29) north, range three (3)
west of the 6th Principal Meridian, in Knox County,
Nebraska; that this defendant had executed to the complainant a quit claim deed for the aforesaid real estate, but
alleges and states the fact to be that said quit claim deed
was executed on the 21st day of March, 1905. That both of
said deeds were duly recorded in the office of the county
clerk of Knox County, Nebraska; that on the 23rd day of
October, 1900, Mary C. Flatt, who is the same person as
Mary C. Gilmore, and who is the mother-in-law of this an-
swering defendant, became the owner, and had conveyed to
her, by good and sufficient warranty deed, for a consideration
of thirty-five hundred dollars, fifteen hundred dollars of
which was cash, and the balance secured to be paid by a
mortgage on the property conveyed, which said property
is described as follows, to-wit: All of that certain tract,
piece or parcel of land situate, lying and being in the said
county of Louisa, state of Virginia, on both sides of the
main county road leading from Louisa courthouse to
Trevilians depot and adjoining the lands of W. A. Nether-
land, W. G. Faulkner, C. W. Vandermark, Henry and
Isaac Poindexter, Elias Jackson and Charles Danne, Jr.,
being part of the land which the late A. A. Gates died seized
and possessed, known as "Walnut Shade", and contain-

two hundred ninety-eight (298) acres, be the same more or less, and that said deeds and mortgages were duly recorded in the Louisa county, Virginia Clerk's office.

This defendant admits that he knew that the complainant had been adjudged a person of unsound mind, on the 22nd day of February, 1902, and by reason thereof was 32 confined in the hospital for the insane at Norfolk,

Nebraska, for about seven months, and that during the month of September, 1902, he was discharged therefrom; that on the 24th day of March, 1908, the complainant and his wife executed a mortgage conveying the aforesaid 240 acres in Knox County, Nebraska, to F. H. Orahan, who was then cashier of the Citizens State Bank of Bloomfield, Nebraska, and now Vice President thereof, to secure the payment of a promissory note for \$3345.69; that on the 10th day of March, 1908, the complainant and his wife conveyed said 240 acres situated in Knox County, Nebraska, by deed to the defendant, and that said deed has been duly recorded in the county Clerk's office of said Knox County, Nebraska, and that for the year 1908, this defendant is to receive \$600.00, as the rental thereof; that on the 19th day of March 1908, Mary C. Gilmore, and W. J. Gilmore executed a deed to the complainant, conveying to him the said real estate situated in Louisa county, Virginia, and that said deed recites the consideration as \$12,750.00, and that on said day the complainant and his wife executed a deed of trust, conveying said real estate situated in Louisa county, Virginia, to Mary C. Gilmore, to secure a balance of four thousand dollars (\$4000.00) of even date therewith, and bearing interest at the rate of 5% per annum, and that both of said instruments have been duly recorded in said Louisa county, Clerk's office.

That the said \$2,000, in bonds hereafter referred to as a part of the consideration paid by the defendant Mary C. Gilmore, had been assigned to one Jason C. Ayres, and the said bond, the interest thereon and other indebtedness of the said Mary C. Gilmore to Jason C. Ayres amounted to the sum of \$4000.00, or more, and that on the 24th day of April, 1908, the said Mary C. Gilmore and W. J. Gilmore 33 more by deed conveyed, assigned and transferred to said Jason C. Ayres all their right and title under the said deed for \$4000.00, which assignment has been duly recorded in said Louisa county Clerk's office.

This defendant admits that complainant did much of his business with the Citizens State Bank of Bloomfield, Nebraska, of which this defendant was president, and in which he was largely interested. This defendant admits that the complainant and his family, on or about the 1st day of April, 1908, moved from Knox County, Nebraska, to the state of Virginia, taking with him some of his effects.

The defendant, further answering said bill of complaint, denies that the complainant's education was meagre and mainly derived from hard experience, and alleges the fact to be, that he was well educated in the German language, moderately well educated in the English language and capable of conducting all ordinary business transactions having accumulated whatever wealth he had in the ordinary conduct of a farm and by shrewd business methods therein, and that he trusted no one, and in making his various contracts and agreements in the conduct of his business made his own computations, his own investigations and exercised and relied upon his own judgment, and relied upon that of [ho] other person, unless it was a member of his own household.

That defendant denies that on the 25th day of February, 1905, the complainant had the sum of \$8,400.00 in cash furnished by himself to pay the purchase price of the real estate situated in Knox county, Nebraska, and this defendant denies that said real estate either at the time of the purchase by the complainant or at any time during his ownership thereof, was free from encumbrance, but [allege] and [state] the facts to be that during said time it was always encumbered in excess of the sum of \$8,345.69.

34 This defendant denies that in March, 1908, or at any other time prior thereto or since, said real estate was worth \$70.00 per acre, but alleges and states the fact to be, that in March, 1908, and at the time complainant and his wife executed their deed to this defendant therefor, that the fair value of said land was not to exceed the sum of \$55.00 per acre, and the value of said entire farm was not to exceed the sum of \$13,200.00.

This defendant denies that the complainant had placed in him the utmost confidence or that he had advised with him, or that defendant had given or the complainant had taken and following this defendant's advise in either business or other matters, or that he had intrusted this defendant with his transactions in a business way, and expressly denies that he had anything to do with making the contract or purchase of said Knox county real estate.

This defendant denies that he was better versed and acquainted either individually through his connections with said bank or in any other manner with complainant's business affairs than complainant, but alleges and states the fact to be that he knew nothing of complainant's business affairs, excepting only such matters as came to him as the officer of said bank in the proper conduct of its business.

This defendant denies that he in any way attempted to gain the confidence of the complainant or that he had gained his confidence, or that he attempted to occupy the position of self-constituted trustee or that he in any way assumed to advise or direct in any way, in any thing, at any time, any action on the part of the complainant or that he attempted to influence the complainant in any business transaction, or that

he in any way abused or mistreated the said complainant, or in any way intentionally or unintentionally either robbed, cheated, wronged or defrauded the complainant out of his estate or any part thereof, or in any way took advantage of him, or that it was necessary for this defendant, in order to liquidate the money due him from the said Mary C. Gilmore to secure a purchaser for said Virginia real estate in excess of its real valuation, or that he in any way by fraud or in any improper manner took advantage of complainant in the contract, in the exchange of said land or in carrying out of said contract and execution thereof, but alleges and states the fact to be, that in all matters with reference thereto he was open, fair straight forward and honest.

This defendant denies that he in any way confederated or conspired with Mary C. Gilmore and W. J. Gilmore or with either of them to perpetrate upon the complainant by the use of fraud, misrepresentations, undue influence, coercion and deceit or with a combination with all or by any other means or methods or by any method his ruin, or to cheat, defraud or wrong him in any way, or that this defendant by any or all or any combination of said methods did cheat or defraud or in any way wrong said complainant.

This defendant denies that he approached the complainant with reference to making a trade between complainant and the said Mary C. Gilmore of the properties described in the said bill of complaint.

This defendant denies that he ever made a specific allegation or representation that there were three hundred acres of the Virginia land, but states the fact to be that since he has known of said tract, it has been known as a three hundred

acre tract and in speaking to the complainant he did so describe it, and that on the 19th day of March, 1908, and
36 prior thereto, the complainant was informed, and knew that the description in deeds conveying said premises were that it contained two hundred and ninety-eight acres more or less, and that knowing this fact he still concluded and carried out said contract on his own initiative and without any duress, fraud or influence of this answering defendant.

That at the time the said complainant learned of said deficiency of two acres and called this [defendant's] attention to it, the defendant gave to the said complainant the following chattels then on said real estate, to-wit: one scolloped cutaway disc, nearly new, one smoothing harrow, nearly new, one wagon and hay rack, one cultivator, one grind stone, and a lot of small tools of the [value] of about \$30.00 and which were accepted by said complainant in lieu of any deficiency aforesaid.

The defendant denies that he made any of the representations contained and set forth in the complainant's bill of complaint, in the paragraphs numbered second to twenty-first, both inclusive, and found on pages nine to fourteen both inclusive of plaintiff's bill of complaint, and denies that the facts are as set forth in said paragraphs numbered second to twenty-first, both inclusive and denies each and every allegation of fact in said paragraphs contained, and denies that said complainant relied upon any statement made by or information received from this defendant, or that he relied upon or trusted in them, and this defendant alleges and states the fact to be that prior to the execution of said contract and making of the deeds necessary to carry the same into effect, said complainant inquired of others who knew of the conditions in Virginia and was informed that [condition-] in said state were

entirely different from those in Nebraska, and that if
37 complainant went to Virginia, expecting to farm as he farmed in Nebraska, he would be severely disappointed; that in Virginia, they lived differently, did differently and farmed differently; and this defendant further alleges that said Virginia [—] is of a good average quality, and if fertilized and farmed as good farmers in that community farm and fertilize their land, will be and is good productive land upon which good paying crops can be raised and produced.

This defendant denies that he is acquainted with and well knows the said real estate in Louisa County, Virginia, or that he so represented to the complainant, and [state-] the fact to be that he was never on said land but once, and then

stopped there but a day and a half and was never in the timber land, and made but a slight examination of the remainder thereof.

That this defendant denies that the complainant was averse to making the exchange of properties and was averse to moving to the state of Virginia, and states the fact to be, that the complainant sent for this defendant repeatedly in order to have him, the defendant, come to see the complainant, for the purpose of arriving at an agreement and contract for the exchange of said realty, and this defendant denies that he in any way, either by himself or through his henchman or by any other person or in any other manner, in the night time or any time, did harass or disturb the complainant and his family or any member thereof, by breaking into his barns and stables, by stealing or attempting to steal his horses or cattle, or by shooting or in any other way or in any other manner by any person, nor did this defendant attempt to harass, disturb or influence said complainant, and

that this defendant denies that any body did [harrass]

38 or disturb the said complainant. And further this defendant alleges that the complainant voluntarily of his own free will and without duress, acting upon his own judgment and after having secured [advise] from persons, strangers to the transaction, executed the deeds and conveyances necessary to carry out said contract of sale, and after he had moved upon the said land in Virginia, expressed himself as pleased and satisfied.

This defendant denies that complainant and his wife, executed the mortgage given to secure the \$5000.00, in the year 1908, and alleges and states the fact to be, that said mortgage was executed in the year 1905, and was to mature in 1910.

The defendant answering, says that he denies that said agreement was made to provide for the execution of the deed conveying the said real estate situated in Nebraska, by March 20th, 1908, in order that the complainant might not be able to make a trip to Virginia, to examine said Virginia real estate, but this defendant alleges and states the fact to be, that said complainant was very desirous and anxious to close up his business matters in Nebraska and move to Virginia, for the purpose of going into possession of said real estate and farming the same during the season of 1908.

This defendant denies that the complainant was to assume the payment of the two mortgages on the Nebraska real estate, aggregating \$8,345.69, but alleges and states the fact

to be, that on the 12th day of March, 1908, at the time of the execution of said contract of exchange, both this defendant and the complainant were under the impression and belief that the said second mortgage was given to secure but the sum of \$2500.00, when in truth and in fact said mortgage was given to secure \$3345.69; that when upon the 19th day
39 of March, 1908, the complainant and this defendant met for the purpose of executing the deeds and conveyances to be executed by said complainant, it was discovered that fixing the value of the Virginia land at \$12,750.00, as had been agreed by said parties, and deducting the sum of \$4000.00, secured by the trust deed thereon, there remained of said consideration the sum of \$8,750.00; and that fixing the value of the Nebraska real estate at \$16,800.00, the amount agreed upon, and deducting the \$5000.00, which this defendant in the deed assumed and agreed to pay, there remained of said consideration the sum of \$11,800.00, and in order to correct the mistake of said parties when making said contract, this defendant paid to the complainant the sum of \$3050.00, which deducted from the \$11,800.00, makes the remainder of the consideration for the Nebraska land the sum of \$8750.00, and that the complainant thereupon took the \$3050.00, so paid to him by this defendant and paid to the Citizens State Bank his debt thereto, which then amounted to about the sum of \$2,690.75, secured by said second mortgage for the expressed sum of \$3345.69.

This defendant denies that the complainant paid the sum of \$3345.00 or any other sum to F. H. Crahan or the Citizens State Bank or to any person for them or either of them, in payment of the debt secured by said second mortgage, except as hereinbefore set forth.

This defendant denies that the complainant ever paid to this defendant or any other person, the sum of \$5000.00, to take up and pay off the indebtedness secured by the first mortgage on said real estate situated in Knox County, Nebraska, and alleges and states the fact to be, that this defendant in pursuance of the contract providing for the exchange of said lands, assumed the payment of said indebtedness of \$5000.00, and when the same shall have matured in 1910, will pay off said indebtedness, and so contracted and agreed in accepting the deed from complainant, made on the 19th day of March, and the reason that there was no mention made in said deed of the assumption of said \$2500.00, mentioned in said contract, was because of the mistake as hereinbefore set forth and the payment by this defendant to the complainant, of the said sum of \$3050.00.

This defendant denies that either as agent of Mary C. Gilmore and W. J. Gilmore, or as the agent of either of them, or acting for himself or acting individually or collectively with any person or in any manner, he cheated, defrauded, robbed, or divested the complainant of his estate or advised him to make sale of his effects by public auction or in any other manner, or advised him to go to his Virginia home without delay.

This defendant further denies each and every allegation in said bill of complaint as to the confidence reposed in this defendant by the complainant as to the ignorance and unsuspecting nature of the complainant, as to the ignorance of the complainant of the circumstances and facts connected with the entering into the contract of exchange and the carrying out and consummation thereof; and every allegation in said bill of complaint which alleges or infers that this defendant in any way, in any manner or in any capacity swindled, cheated, robbed, defrauded or wronged the complainant, or persuaded or influenced him to leave Nebraska or [—] to Virginia.

This defendant denies that the complainant, by virtue of the public auction of his effects, suffered a great loss, and denies that his effects were sold at twenty-five per cent beneath their real value, and alleges and states the facts 41 to be, that said property sold at its full value and some of it at much more than its full value.

That this defendant has no knowledge as to the freight bills and expense of complainant moving to Virginia, or of the amounts expended in improvements, machinery and labor, and therefore denies each and every allegation in said bill of complaint, and states the fact to be, that if complainant has expended his money with ordinary prudence it will be no loss to him, but will insure reasonable and ordinary returns if said lands so exchanged are properly and intelligently farmed.

This defendant denies that the complainant is in want, or is ruined, or has lost money by reason of any improper or wrongful or imprudent act of this defendant.

III.

This defendant, for further answer to the bill of complaint of said plaintiff, alleges that at all the times mentioned in the bill of complaint he has been a resident of the city of Bloomfield, in the county of Knox, and state of Nebraska, engaged in the banking business, but that for the past six years, by reason of age and ill health he has been unable to actively

engage in the control and conduct of said business, and it has been largely conducted and controlled by other officers and agents of the said Citizen State Bank, and that he had but slight knowledge of and took no particular interest in the business transactions of the complainant, either with said bank or any other person or corporation.

That on or about the 25th day of February, 1905, the complainant purchased the northeast quarter ($NE\frac{1}{4}$) of Section six (6), and the north half of the northwest quarter ($N\frac{1}{2} NW\frac{1}{4}$) of section eight (8), all in township twenty nine (29) north, range three (3) west of the sixth Principal Meridian, in Knox county, Nebraska, being a portion of

the land in controversy in this action and in order to pay for the same, borrowed from this defendant and the Citizens State Bank the sum of \$8,871.54. Five thousand dollars (\$5000.00) thereof was borrowed from this defendant, and secured by a first mortgage on said real estate, being the mortgage referred to in complainant's bill of complaint, as executed on the 24th day of February, 1908, an alleged copy of which is marked Exhibit "I" thereof, and the said sum of \$3345.69, was borrowed from the Citizens State Bank and secured by a second mortgage on said land to F. H. Crahan; that the balance of said indebtedness due from complainant to said bank, to-wit: the sum of \$525.85 was secured by a chattel mortgage on the complainant's personal property.

That at said time said land was worth about \$35.00 per acre. That on March 12th, 1908, said lands had increased in value until they were worth from \$50.00 to \$55.00 per acre, but no more. That the said defendant, at all times mentioned in complainant's bill of complaint, had but slight knowledge of land in the state of Virginia and its productiveness and fertility, and of the particular tract described in complainant's bill of complaint and called "Walnut Shade" having been on said premises but one and a half days on a visit, and that what information and knowledge he had was obtained from other persons, excepting only what he saw while stopping in the dwelling house thereon while so visiting, and in a short walk across a portion of the cultivated land, and that this defendant so informed him, the complainant, prior to the signing of the contract on the 12th day of March, 1908.

That during the year 1907, the complainant came to the defendant in the city of Bloomfield, and inquired as to whether or not the defendant could procure him a farm or plantation in the state of Virginia, or some where south, where it would be warmer than it is in Knox County,

or the northern part of Nebraska, and requested him that if he, the defendant, could, he would like to have him procure such farm or plantation for the complainant.

That the defendant Mary C. Gilmore was the owner of the tract of land described in the bill of complaint and called "Walnut Shade," and located in Louisa county, state of Virginia, that she and her husband were both old, being near 70 years of age, and without any help to farm and manage said real estate, except by renting the same. That said real estate is in that portion of Virginia which has been farmed for a long time, and in order to be farmed profitably is aided and assisted by the use of fertilizers; and that when farmed as is advised and directed by the better class of farmers and by those interested in the agricultural development of said state is profitable.

That the said Mary C. Gilmore was desirous of disposing of said property and removing to some place where she would be nearer her children and so avoid the burden of overseeing said plantation, and had requested the defendant to sell or exchange the same with that end in view, and to use his best judgment and best endeavors to secure her adequate and full compensation for said premises. That said premises were on the 12th day of March, 1908, of the value of at least \$35.00 per acre. That prior to the signing of said contract on the 12th day of March, 1908, this defendant informed the [complain-t] that he was representing the said Mary C. Gilmore, in making said exchange, and was looking after her interests; that during the year immediately [preceeding] the 12th

day of March, 1908, the complainant on several occasions tried to make a trade or exchange, for said Virginia plantation, and repeatedly brought up the subject with that end in view, and that as this defendant now remembers, there was no occasion upon which this defendant took the initiative, that at the time of the making of said contract and the fixing of said price per acre for the purpose of said exchange, neither party made representations as to value, other than that imported by the fixing of the price he asked for the land offered in the exchange or trade, and that the price of \$70.00 per acre asked by the complainant for his land was at least \$15.00 per acre in excess of its actual value.

That without any misrepresentation, fraud, collusion, conspiracy, undue influence, dureas, or any deceit, art, or device on the part of this defendant, or those charged with him, or any other person; but after a full, fair, and complete disclosure to the complainant of all things known by this de-

fendant with reference to the said real estate, so far as inquired of, and with no attempt to prevent the fullest investigation, and after inquiries made of disinterested persons, strangers to this action, the contract set forth in plaintiff's bill of complaint, was duly and regularly executed by the complainant and this defendant, the said defendant acting for the said Mary C. Gilmore.

That by the terms of said contract and agreement it was intended that this defendant and the said Mary C. Gilmore should assume the mortgage upon the said Knox County, land to the amount of \$7,500 which was by said parties then believed to be the actual amount of said encumbrance.

That the said complainant was extremely anxious to close said deal, sell his effects and proceed to Virginia, to occupy
45 said premises in Louisa county, at as early a date as possible, although this defendant did advise against such procedure because the [sea-on] had so far advanced; but that said advise and suggestions were disregarded by the complainant.

That thereupon on the 19th day of March, 1908, all of the papers necessary to carry out said contract were prepared. Those to be executed by the complainant were by him executed and delivered, and those to be executed by the said Mary C. Gilmore and W. J. Gilmore, were sent to them in Virginia, and by them executed, and in accordance with the agreement with the complainant, by them retained until his, the complainant's arrival in Virginia, at which time they were delivered to the complainant and by him received and, after an examination of the property, and having declared himself fully satisfied, the complainant accepted said deeds and recorded them in the Clerk's office in Louisa county, Virginia.

That on said 19th day of March, 1908, at the time of carrying out of said contract by the examination of said deeds, it was discovered that said second mortgage covering complainant's land in Nebraska, was for the sum of \$3345.69, the exact indebtedness being to both parties unknown, and thereupon this defendant instead of assuming said second mortgage, to the amount of \$2500.00, paid the said complainant the sum of \$3050.00, that being the difference between the tracts of land at the agreed prices, the Knox County land being charged with the \$5,000. mortgage, and the Louisa county land being charged with the \$4,000. That at said time and place, and before the execution of said instruments the complainant called attention to the fact that there

was but two hundred and ninety-eight acres in the Louisa county, Virginia, tract of land, and that prior to the execution of said instruments, and deeds of conveyance, this defendant, then being the owner thereof of one [scollop] cutaway disc, nearly new, one smoothing harrow, nearly new, one wagon and hay rack, one cultivator, one garden cultivator, one grindstone, garden tools, and other farm tools of the value of about \$80.00, and then located on said farm in Virginia, or near thereto, turned over and transferred to the complainant the said chattels above described to make up and take the place of said deficiency of two acres of land.

That as to whether or not said tract of land contained two hundred and ninety eight acres or three hundred acres this defendant has no authentic information; but this defendant is informed and believes, and on such information and belief, alleges that said tract of land contains full three hundred acres.

That in the execution of said instruments, deeds and conveyances, the delivery thereof, and in all acts and deeds done or performed in the carrying into execution and fulfillment of said contract of trade or exchange this defendant acted in the utmost good faith toward the complainant, and that without any misrepresentation, fraud, collusion, conspiracy, undue influence, duress or any deceit, art, or device on the part of this defendant, or those charged with him or any other person, but after a full, fair and complete disclosure to the complainant of all things known by this defendant with reference to said real estate, so far as inquired of, and with no attempt to prevent the fullest investigation, and after inquiries made by the complainant of disinterested persons, strangers to this action, the aforesaid deeds and conveyances were duly executed, delivered, accepted and received by the respective parties, and by them recorded.

That upon the arrival in the state of Virginia, and after an examination had been made of said premises by the complainant the said complainant represented to the said 47 Mary C. Gilmore and W. J. Gilmore, that this defendant had contracted for, bargained and agreed to and with the complainant for the transfer and delivery to the complainant of one cow, certain turkeys and chickens and a portion of the household furniture of the said Gilmore, that although protesting that they did not so understand the con-

tract, they [acceded] to the demands of said complainant and delivered to him said chattels, which the complainant received and still retains.

The defendant further states that the said Virginia farm is worth at a [fa-r] valuation the sum of \$35.00 per acre; that the said farm has about one hundred and sixty acres of land that could be cultivated now, and about one hundred acres of old timber land that has never been cleared off, and about forty acres that has grown up to young timber and brush since they ceased to cultivate said land some five or six years ago; that by proper farming and fertilizing the said land will produce from twenty to fifty bushels of corn to the acre, from twelve to twenty-three bushels of wheat to the acre and from ten to twenty bushels of oats to the acre; that the wheat, oats and all kinds of small grain must be sown in the fall of the year to produce good returns.

This defendant further states that there is on said farm or plantation in Virginia about one hundred and fifty acres of gray clay soil, and about fifty acres of red clay soil, that the defendant does not know the character of the soil in the timber; that where the said land is well farmed [the] fertilized it will produce from one and a half to three tons of hay to the acre; that there is on said plantation an [orchard] comprising about seven acres and having standing and growing thereon between four and five hundred fruit trees; that there is situated on said plantation a large bank barn with 48 stone basement and two grain and hay mows and one overhead mow, the size of this this defendant doesn't know, and four stables and two feeding alleys; that there is situated on said farm or plantation a large dwelling house having thirteen rooms, built partly of brick and partly of hard pine, finished inside with hard pine in natural colors, all of which the said defendant informed the said complainant at the time and prior to the signing and delivery of deeds for said lands.

That in answer to the request for a disclosure, as to the financial relations between this defendant and his co-defendants, this defendant alleges that the defendant W. J. Gilmore, never was at any time indebted to this defendant, that the defendant Mary C. Gilmore was indebted to him on a note dated February 15, 1905, in the sum of \$1476.60, a note for \$30.00, dated June 28th, 1905, a note for \$55.00 dated November 1, 1906, a note for \$60.00 dated March 13, 1907 and the sum of \$30.00 due this defendant's wife and secured April 6, 1906; that this defendant after said Gilmore had

moved to the state of Nebraska, on the 19th day of March, 1908, purchased of the said Mary C. Gilmore, the said two hundred and forty acres of land in Knox county, Nebraska, for \$52.50 per acre, all of which he has paid.

This defendant denies each and every allegation in said bill of complaint not hereinbefore admitted, or otherwise answered.

Wherefore this defendant having fully answered, confessed, traversed, and avoided or denied all matters in said bill of complaint material to be answered according to his best knowledge and belief, humbly prays this honorable court, to enter its decree, that this defendant be hence 49 dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity.

W. D. FUNK and R. E. EVANS,
Solicitors & Attorneys for Defendant.

W. D. Funk and
R. E. Evans,
Of Counsel.

State of Nebraska,
Knox County—ss.

Edward Renard, of lawful age, being first duly sworn on oath deposes and says; that he is the defendant in the defendant in the above entitled cause; that he has read the foregoing answer and knows the contents thereof; and that the facts therein stated are true as he verily believes.

EDWARD RENARD.

Subscribed in my presence and sworn to before me this 26th day of December, A. D. 1908.

(Seal).

GEO. BALLANTYNE,
Notary Public.

49a Answer of the Defendant Mary C. Gilmore.

Filed in the Circuit Court on December 29, 1908.

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This defendant, Mary C. Gilmore, now, and at all times hereafter, saving to herself all and all manner of benefit of exceptions or otherwise, that can be or may be had, or taken

to the many errors, uncertainties, and imperfections in said Bill of Complaint, for answer thereto or so much thereof as this defendant is advised is material or necessary for him to make answer thereto. Answering says: The defendant, Mary C. Gilmore admits that the complainant John H. Friederichsen is a citizen of the state of Virginia; that he was born in the Empire of Germany and became a citizen of the United States of America, by naturalization; that the complainant has a wife and family consisting of nine children all under twenty-one years of age; that on the 25th day of February, 1908, he became the owner and had conveyed to him by deed, the northeast quarter (N. E. $\frac{1}{4}$) of section six (6), and the north half of the Northwest quarter (N. $\frac{1}{2}$ NW. $\frac{1}{4}$) of section eight (8) all in township twenty-nine north of range three (3), west of the sixth principal meridian in Knox county, Nebraska; that the defendant Edward Renard had executed to the complainant a quit claim deed for the aforesaid real estate, but alleges and states the fact to be that said quit claim was executed on the 21st day of March, 1905;

that both of said deeds were duly recorded in the office

49b of the County Clerk of Knox county, Nebraska; that on the 23rd day of October, 1900, Mary C. Flatt, who is the same person as this defendant, and who is the mother-in-law of the defendant Edward Renard, became the owner and had conveyed to her, by good and sufficient warranty deed, for a consideration of thirty-five hundred dollars, fifteen hundred dollars of which was cash, and the balance secured to be paid by a mortgage on the property conveyed, which said property is described as follows, to-wit: All of that certain tract, piece or parcel of land situated, lying and being in the said County of Louisa, state of Virginia, on both sides of the Main County road leading from Louisa County Court House to Trevillian depot and adjoining the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandermarck, Henry and Isaac Poindexter, Elias Jackson and Charles Danne, Jr., being part of the land which the late A. A. Gates died [ceased] and possessed, known as "Walnut Shade", and containing two hundred ninety-eight (298) acres, be the same more or less, and that deeds and mortgages were duly recorded in the Louisa County, Virginia, Clerk's office.

This defendant admits that on the 24th day of March, 1908 the complainant and his wife executed a mortgage conveying the aforesaid 240 acres in Knox county, Nebraska, to F. H. Crahan, who was then cashier of the Citizens State Bank of Bloomfield, Nebraska, and now vice president thereof, to secure the payment of a promissory note for \$3345.69;

that on the 10th day of March, 1908, the complainant and his wife conveyed said 240 acres situated in Knox County, Nebraska, by deed to the defendant Edward Renard, and that said deed has been duly recorded in the office of the county Clerk in Knox county, Nebraska, and that for the year 1908 he is to receive \$600, as the rental thereof.

That on the 19th day of March, 1908, this defendant, and W. J. Gilmore, executed a deed to the complainant, 49c conveying to him the said real estate situated in Louisa County, Virginia, and that said deed recites the consideration as \$12750.00, that on said day the complainant and his wife executed a deed of trust conveying said real estate situated in Louisa County, Virginia, to this defendant, to secure a balance of \$4000.00, of even date therewith, and bearing interest at the rate of 5 per cent per annum, and that both of said instruments have been duly recorded in said Louisa County Clerk's office.

That the said \$2,000. in bonds hereafter referred to as a part of the consideration paid by this defendant, had been assigned to one Jason C. Ayres, and the said bond, the interest thereon and other indebtedness of this defendant to Jason C. Ayres amounted to the sum of \$4,000.00, or more, and that on the 24th day of April, 1908, this defendant and W. J. Gilmore by deed conveyed, assigned and transferred to said Jason C. Ayres all their right and title under the said trust deed for \$4,000. which assignment has been duly recorded in said Louisa County Clerk's office.

This defendant has no knowledge as to past insanity of the complainant or as to his confinement in a lunatic asylum, and denies each and every allegation in the Bill of Complaint with reference thereto.

This defendant has no knowledge or information as to where complainant did his business, and denies each and every allegation with reference thereto.

This defendant has no knowledge or information as to complainant's education, expenses, wealth or the manner or method of its accumulation or as to his confidence or credulity or the relations existing between complainant and the defendant Edward Renard, or the representations made to complainant by said Edward Renard and denies each and every allegation in reference to each and all of said 49d matters contained in said Bill of Complaint.

This defendant has no knowledge or information as to whether the said Edward Renard approached the complainant to make a trade or exchange and denies each and

every allegation in said Bill of Complaint with reference thereto. This defendant has no knowledge as to any of the representations made by the defendant Edward Renard and denies each and every allegation as to representations and declarations of the said Edward Renard, or any other person with reference to said real estate in Louisa County, or any condition or thing effecting it or its value, fertility, desirability, or quality of the land producing either generally or as to any particular crops or crop, and denies that the complainant was in any way influenced by this defendant, either directly or indirectly, or through others in the making of said exchange, and this defendant upon information and belief alleges that prior to the execution of the deed of exchange by the complainant he was fully advised as to all matters involved in said exchange and acted upon his own volition and guided wholly by his own judgment.

This defendant, further answering denies that she confederated or conspired or had any understanding with the defendants Edward Renard or W. J. Gilmore, or either of them to cheat, swindle, wrong or defraud the complainant by fraud, misrepresentation, undue influence, [coercion] and deceit, or either of them or any of them, or by any mode or method whatsoever, and denies that she in any way or by any means, either by herself or other person or persons sought to, or did in any way wrong the complainant out of his real estate or any other property, and this defendant denies that the complainant was in any way, or by any means, by any of the defendants, either individually or collectively, cheated,
49e swindled, wronged or defrauded and the defendant answering denies that she or either of her co-defendants, or she with either of them, or that she and they acting together or in any way premeditated or discussed or designed any means whatsoever to swindle, cheat, wrong or defraud the complainant, and denies that the complainant was in any way cheated, wronged, swindled or defrauded.

This defendant admits that the complainant and his family on or about the 1st day of April, 1908, moved, from Knox county, Nebraska, to the state of Virginia, taking with him some of his effects.

II.

That the defendant denies that on the 25th day of February, 1905, the complainant had the sum of \$8,400.00, in cash furnished by himself to pay the purchase price of the real estate situated in Knox county, Nebraska, and this defend-

ant denies that said real estate, either at the time of the purchase by the complainant or at any time during his ownership thereof was free from encumbrance, but [allege-] and [state-] the facts to be that during said time it was always encumbered in excess of the sum of \$8,345.69.

This defendant denies that in March, 1908, or at any time prior thereto, or since, said real estate was worth \$70.00 per acre, but alleges and states the fact to be, that in March 1908, and at the time complainant and his wife executed their deed to this defendant therefor, that the fair value of said land was not to exceed the sum of \$52.50 per acre, and the value of said entire farm was not to exceed the sum of \$12600.00.

This defendant denies that she in any way confederated or conspired with Edward Renard and W. J. Gilmore or with either of them to perpetrate upon the complainant by the use of fraud, misrepresentations, undue influence, coercion and deceit, or with the combination with all or by any other means or methods, or by any method his ruin, or to cheat, defraud or wrong him in any way, or that this defendant by any or all, or any combination of said methods did cheat, or defraud, or in any way wrong said complainant.

49f That at the time the said complainant learned of said deficiency of two acres and called the defendant, Edward Renard's attention to it, the defendant Edward Renard gave to the said Complainant the following chattels then on said real estate, to-wit: One scolloped cut-away disc, nearly new, one smoothing harrow, nearly new, one wagon and hay rack, one cultivator, one grind stone, and a lot of small tools, of the value of about \$90.00, and which were accepted by said complainant in lieu of any deficiency aforesaid.

The defendant denies that she made any of the representations contained and set forth in the complainant's bill of complaint in the paragraphs numbered second to twenty-first both inclusive, and found on pages nine to fourteen, both inclusive of plaintiff's bill of complaint, and denies that the facts are as set forth in said paragraphs numbered second to twenty-first, both inclusive, and denies each and every allegation of fact in said paragraphs contained, and denies that said complainant relied upon any statement made by or information received from this defendant, or said Edward Renard, or that he relied upon or trusted in them, and this defendant alleges and states the facts to be that prior to the execution of said contract and making of the deeds necessary to carry the same into effect said complainant inquired of

others who knew the conditions in Virginia, and was informed that conditions in said state were entirely different from those in Nebraska, and that if complainant went to Virginia, [excepting] to farm as he farmed in Nebraska, he would be severely disappointed: that in Virginia, they lived differently, did differently and farmed differently; and this defendant further alleges that said Virginia land is of a good average quality, and if fertilized and farmed as good farmers in that community farm and fertilize their land, will be and is good productive land upon which good paying crops can be raised and produced.

That this defendant denies that the complainant was averse to making the exchange of property and was averse to moving to the state of Virginia, and states the fact to be, that the complainant sent for the defendant Edward Renard repeatedly, in order to have him come to see the complainant, for the purpose of arriving at an agreement and contract for the exchange of said realty, and this defendant denies that she in any way, either by herself or through any other person or persons or in any other manner, in the night time, or any time, did [harrass] or disturb the complainant and his family or any member thereof, by breaking into his barn and stables, by stealing or attempting to steal his horses or cattle, or by shooting or in any other way or in any other manner, did this defendant either by herself or any other person, attempt to [harrass], disturb, or influence said complainant, and that this defendant denies that anybody did [harrass] or disturb the said complainant, and further this defendant alleges that the complainant voluntarily of his own free will, without duress, acting upon his own judgment and after having secured advice from persons, strangers to the transaction, executed the deeds and conveyance necessary to carry out said contract of sale, and after he had moved upon the said land in Virginia, expressed himself as pleased and satisfied.

This defendant denies that complainant and his wife executed the mortgage given to secure the \$5000. in the year 1908, and alleges and states the fact to be, that said mortgage was executed in the year 1905, and was to mature in 1910.

49. This defendant denies that said agreement was made to provide for the execution of the deed conveying the said real estate situated in Nebraska, by March 20, 1908, in order that the complainant might not be able to make a trip to Virginia, to examine said Virginia real estate, but this defendant alleges and states the fact to be, that said com-

plainant was very desirous and anxious to close up his business matters in Nebraska, and move to Virginia, for the purpose of going into possession of said real estate and farming the same during the season of 1908.

This defendant denies that the complainant was to assume the payment of the two mortgages in the Nebraska real estate, aggregating \$8345.69, but alleges and states the fact to be, that on the 12th day of March, 1908, at the time of the execution [on] said contract of exchange, both the defendant Edward Renard and the complainant were under the impression and belief that the said second mortgage was given to secure but the sum of \$2500.00 when in truth and in fact said mortgage was given to secure \$3345.69; that when upon the 19th day of March, 1908, the complainant and Edward Renard met for the purpose of executing the deeds and conveyance to be executed by said complainant, it was discovered that fixing the value of the Virginia land at \$12,750. as had been agreed for said parties, and deducting the sum of \$4,000. secured by the trust deed thereon, there remained of said consideration the sum of \$8,750.; and that fixing the value of the Nebraska real estate at \$16,800. the amount agreed upon, and deducting the \$5,000.00 which Edward Renard, in the deed assumed and agreed to pay, there remained of said consideration, the sum of \$11,800. and in order to correct the mistake of said parties when making said contract, Edward Renard, paid to the Complainant, the 49i sum of \$3050.00, which deducted from the \$11,800.00, makes the remainder of the consideration for the Nebraska land, the sum of \$8,750.00, and that the complainant thereupon took the \$3050.00, so paid to him by Edward Renard, and paid to the Citizens State Bank his debt thereto, which then amounted to about the sum of \$2,690.75, secured by the said second mortgage for the express sum of \$3,345.69.

This defendant denies that the defendant paid the sum of \$3345.00 or any other sum to F. H. Graham, or the Citizens State Bank or to any person for them or either of them, in payment of the debt secured by said second mortgage, except as hereinbefore set forth.

This defendant denies that the complainant ever paid to Edward Renard or to this defendant or any other person the sum of \$5,000.00 to take up and pay off the indebtedness secured by the first mortgage on said real estate, situated in Knox County, Nebraska, and alleges and states the fact to be, that Edward Renard in pursuance of the contract providing for the exchange of said lands, assumed the payment of said indebtedness of \$5,000.00 and when the same shall

have matured in 1910, will pay off said indebtedness, and so contracted and agreed in accepting the deed from complainant, made on the 19th day of March, 1908, and the reason that there was no mention made in said deed of the assumption of said \$2500.00 mentioned in said contract, was because of the mistake as hereinbefore set forth and the payment by Edward Renard to the Complainant of the said sum of \$3050.00.

This defendant denies that either as agent of this defendant, and W. J. Gilmore, or as agent for either of them, or acting for himself, or acting individually or collectively with any person or in any manner, the said Edward Renard, or this defendant or either or both of them, cheated, defrauded, robbed or divested the complainant of his estate or advised him to make sale of his effects by public auction, or in any other manner, or advised him to go to his Virginia home without delay.

This defendant further denies each and every allegation in said bill of complaint as to the confidence reposed in Edward Renard by the complainant as to the ignorance and unsuspicous nature of the complainant as to the ignorance of the complainant of the circumstances and facts connected with the entering into the contract of exchange, and the carrying out and [consum-ation] thereof; and every allegation in said bill of complaint which alleges or infers that this defendant in any way, in any manner or in any capacity, or through or by any person or persons swindled, cheated, robbed, defrauded or wronged the complainant, or persuaded him to leave Nebraska or go to Virginia.

This defendant denies that the complainant by virtue of the public auction of his effects suffered a great loss, and denies that his effects were sold at twenty-five per cent beneath their real value and alleges and states the fact to be that said property sold at its full value and some of it at much more than its full value.

That this defendant has no knowledge as to the freight bills and expense of complainant moving to Virginia, or of the amounts expended in improvements, machinery and labor, and therefore denies each and every allegation in said bill of complaint with reference thereto, and states the fact to be, and that if complainant has expended his money with ordinary prudence it will be no loss to him, but will insure reasonable and ordinary returns if said lands so exchanged are properly and intelligently farmed.

This defendant denies that the complainant is in want or
is ruined, or has lost money by reason of any improper
49k or wrongful or imprudent act of this defendant.

III.

That the defendant for further answer to said bill of complainant alleges and states to the Court that at all times mentioned in the bill of complaint prior to about the 9th day of April, 1908, she was a resident of Louisa County, Virginia, and has no knowledge or information as to any business relations of the complainant or as to who he advises with, relied upon or trusted, or as to what real estate he owned prior to receiving notice of the negotiation between the complainant and the said Edward Renard, that this defendant had no knowledge of the complainant's real estate or its value prior to said negotiations and upon information and belief alleges that the real estate described in the bill of complaint as owned by the complainant was at the time of the exchange worth from \$50.00 to \$55.00 an acre and no more and was encumbered in the sum of \$7690.75; that this defendant was the owner of the tract of land described in the bill of complaint and called "Walnut Shade," and located in Louisa county, state of Virginia; that she and her husband were both old, being near 70 years of age, and without any help to farm and manage said real estate, except by renting the same. That said real estate is in that portion of Virginia which has been farmed for a long time, and in order to be farmed profitably is aided and assisted by the use of fertilizers; and that when farmed as is advised and directed by the better class of farmers and by those interested in agricultural development of said state, is profitable.

That this defendant was desirous of disposing of said property and removing to some place where she would be nearer her children and so avoid the burden of overseeing said plantation, and had requested the defendants, Edward 49l Renard, to sell or exchange the same with that end in view, and to use his best judgment and best endeavors to secure her adequate and full compensation for said premises; that said premises were on the 12th day of March, 1908 of the value of at least \$35.00 per acre. That prior to the signing of said contract on the 12th day of March, 1908, Edward Renard informed the complainant that he was representing this defendant in making said exchange and was looking after her interest; that during the year immediately preceding the 12th day of March, 1908, the [complainant] on several occasions tried to make a trade or exchange, for said Virginia

plantation, and repeatedly brought up the subject with that end in view; that at the time of the making of the said contract and the fixing of said price per acre for the purpose of said exchange, neither party made representations as to value other than that imported by the fixing of the price he asked for the land offered in the exchange or trade, and that the price of \$70.00 per acre asked by the complainant for his land, was at least \$15.00 per acre in excess of its actual value.

That without any misrepresentation, fraud, conclusion, conspiracy, undue influence, duress, or any deceit, art, or device on the part of this defendant, or those charged with her, or any person; but after a full, fair and complete disclosure to the complainant of all things known by this defendant with reference to the said real estate, so far as inquired of, and with no attempt to prevent the fullest investigation, and after enquiries made by complainant of disinterested persons, strangers to this action, the contract set forth in plaintiff's bill of complaint, was duly and regularly executed by the complainant and the defendant, the said Edward Renard acting for this defendant.

49m That by the terms of said contract and agreement it was intended that Edward Renard and this defendant should assume the mortgage upon the said Knox county land to the amount of 7500.00 which was by said parties then believed to be the actual amount of said encumbrance.

That the said complainant was extremely anxious to close said deal, sell his effects and proceed to Virginia, to occupy said premises in Louisa County at as early a date as possible, although Edward Renard did advise against such procedure because the season had so far advanced; but that said advise and suggestions were disregarded by the Complainant.

That thereupon on the 19th day of March, 1908, all of the papers necessary to carry out said contract were prepared. Those to be executed by the complainant were by him executed and delivered, and those to be executed by this defendant and W. J. Gilmore were sent to them in Virginia, and by them executed, and in accordance with the agreement with the complainant, by them retained until his complainant's arrival in Virginia, at which time they were delivered to the complainant and by him received and after an examination of the property, and having declared himself fully satisfied he accepted said deeds and recorded them in the Clerk's office in Louisa County, Virginia.

That on the 19th day of March, 1908 at the time of carrying out said contract by the execution of said deeds, it was discovered that said second mortgage covering complainants land in Nebraska was for the sum of \$3345.69, and the exact indebtedness being to both parties unknown, thereupon, Edward Renard instead of assuming said second mortgage to the amount of \$2500.00, paid to said Complainant the sum of \$3050.00, that being the difference between the rates of the

respective tracts of land at the agreed price. The
49n Knox county land being charged with the \$5000.00
mortgage and the Louisa County land being charged
with the \$4000.00. That at said time and place, and before
the execution of said instruments, the complainant called at-
tention to the fact that there was but two hundred and
[ninety-eight] acres in the Louisa County, Virginia tract of
land, and that prior to the execution of said instruments and
deeds of conveyance. Edward Renard then being the owner
thereof of one [scollop] cut-away disc, nearly new, one smoothing
harrow, nearly new, one wagon and hay rack, one culti-
vator, one garden cultivator, one grind stone, garden tools,
and other farm tools of the value of about \$80.00 and then
located on said farm in Virginia, or near thereto, turned
over and transferred to the complainant the said chattels
above mentioned, to make up and take the place of said de-
ficiency of two acres of land.

That as to whether or not said tract of land contained two
hundred and ninety-eight acres, or three hundred acres, this
defendant has no authentic information, but this defendant is
informed and believes, and on such information and belief,
alleges that said tract of land contains full three hundred
acres.

That in the execution of said instruments, deeds and con-
veyance, the delivery thereof, and in all acts and deeds done
or performed in the carrying into execution and fulfillment of
said contract of trade or exchange, this defendant acted in
the utmost good faith toward the complainant, and that with-
out any misrepresentation, fraud, conclusion, conspiracy, un-
due influence, duress, or any deceit, art, or device on the part
of this defendant, or those charged with her or any other per-
son, but after a full, fair and complete disclosure to the com-
plaintant of all things known by this defendant with
49o reference to said real estate, so far as inquired of and
with no attempt to prevent the fullest investigation,
and after inquiries made by the complainant of disinterested

persons, strangers to this action, the aforesaid deeds and conveyance were duly executed, delivered, accepted and received by the respective parties, and by them recorded.

That upon the arrival in the state of Virginia, and after an examination had been made of said premises by the complainant, the said complainant represented to this defendant and W. J. Gilmore, that Edward Renard had contracted for, bargained and agreed to and with the Complainant for the transfer and delivery to the complainant of one cow, certain turkeys and chickens and a portion of the household furniture of the said Gilmore, that although protesting that they did not so understand the contract, they [acceeded] to the demands of said complainant and delivered to him said chattels, which the complainant received and still retains.

The defendant further states that the said Virginia farm is worth at a fair valuation the sum of \$35.00 per acre; that the said farm has about one hundred and sixty acres of land that could be cultivated now, and about one hundred acres of old timber land that has never been cleared off, and about forty acres that has grown up to young timber and brush since they ceased to cultivate said land some five or six years ago; that by proper farming and fertilizing the said land will produce from 40 to 50 bushels of corn to the acre, from 12 to 23 bushels of wheat to the acre, and from 10 to 20 bushels of oats to the acre; and that the wheat, oats, and all kinds of small grain must be sown in the fall of the year to produce good returns.

This defendant further states that there is on said farm or plantation in Virginia about one hundred and fifty
49p acres of gray clay soil, and about fifty acres of red clay soil, the timber land being asoil; that where the said land is well farmed and fertilized it will produce from one to three tons of hay to the acre; that there is on said plantation an orchard comprising about seven acres and having standing and growing thereon between four and five hundred fruit trees; that there is situated on said plantation a large bank barn with stone basement and two grain and hay mows and one overhead mow, the size of which this defendant does not know, and four stables and two feeding alleys; that there is situated on said farm or plantation a large dwelling house [have] 13 rooms, built partly of brick and partly of hard pine, finished inside with hard pine in natural colors, of all of which the complainant was informed by the said Edward Renard at the time of and prior to the signing and delivering of deeds for said lands.

That in answer to the request for a disclosure, as to the financial relations between this defendant and her co-defendants, this defendant alleges that the defendant, W. J. Gilmore never was indebted to the said Edward Renard, and that this answering defendant was indebted to him on a note dated February 15, 1905, in the sum of \$1476.60; a note for \$30.00 dated June 28, 1905; a note for \$55.00 dated November 1st, 1906; a note for \$60.00 dated March 13, 1907; and the sum of \$30.00 due this defendant's wife and secured April 6, 1906; that this defendant, after she had moved to the state of Nebraska, and on the 19th day of March, 1908, purchased of said Mary C. Gilmore the said two hundred and forty acres of land in Knox county, Nebraska, for \$52,50 per acre, all of which he has paid.

This defendant denies each and every allegation in said bill of complaint not hereinbefore admitted or otherwise answered.

49q Wherefore, this defendant having fully answered, confessed, traversed, and avoided or denied all matters in said bill of complaint material to be answered according to her best knowledge and belief, humbly prays this Honorable Court, to enter its decree that this defendant be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

W. D. FUNK, &
R. E. EVANS,
Solicitors for Defendant.

W. D. Funk and R. E. Evans,
Of Counsel.

State of Nebraska,
County of Wayne—ss.

Mary C. Gilmore, of lawful age, being first duly sworn on oath, deposes and says; that she is the defendant in the above entitled cause; that she has read the foregoing answer, and knows the contents thereof, and that the facts therein stated are true as she verily believes.

MARY C. GILMORE.

Subscribed in my presence and sworn to before me this 26th
day of December, A. D. 1908.

(Seal)

GEO. BALLANTYNE.
Notary Public.

50 (Replication to Answers of Edward Renard and W. J. Gilmore, filed in the Circuit Court on December 17, 1908.)

Replication of the above named complainant to the answers of the above named defendants, Edward Renard and W. J. Gilmore.

This replicant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of said defendants, Edward Renard and W. J. Gilmore, for replication thereunto severally sayeth that he does and ever will maintain and prove his said bill of complaint to be true, certain and sufficient in the law to be answered unto by the said defendants, Edward Renard and W. J. Gilmore, and that the answers of said defendants, Edward Renard and W. J. Gilmore, are very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in said answers of the said defendants, Edward Renard and W. J. Gilmore, contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this replicant is ready to fully maintain and prove, as this honorable court shall direct, humbly as in and by his said bill of complaint he has already prayed.

51

W. C. BIBB,
WM. V. ALLEN &
J. H. BERRYMAN,
Solicitors for Complainant.

Order appointing Master in Chancery pro hac vice.
April 17, 1909.

On the stipulation of the parties hereto for the appointment of a master in chancery pro hac vice in this case, it is here ordered that the Hon. Isaac Powers of Norfolk, Nebraska, because of his experience and qualifications, is hereby appointed a master in chancery pro hac vice in this case to examine the record and evidence now on file and to be hereafter taken and filed in this case, and to make a finding of facts upon the issues joined between the parties and to report the same and his conclusions of law thereon to the Court and to exercise all such other authority as is commonly

exercised by a master in chancery, and the Clerk is hereby directed to transmit a certified copy of this order to said Master in Chancery pro hac vice.

W. H. MUNGER,
Judge.

52 (Report of Master in Chancery, filed in the District Court on August 20, 1912.)

In The District Court of the United States of America, for the District of Nebraska, Norfolk Division.

John H. Friederichsen, Complainant,

vs.

Edward Renard, in his own right and as agent for Mary C. Gilmore and Mary C. Gilmore and W. J. Gilmore, Respondents,

To the Honorable, the District Court of the United States, for the District of Nebraska, Norfolk Division.

Your Master in Chancery pro hac vice appointed in the above entitled cause to hear and examine the evidence offered by the parties in said cause and to make a finding of facts thereon upon the issues joined in said action and to report the same together with the conclusions of law to the Court, after hearing the evidence offered by the parties, which said evidence was reduced to writing and is hereto attached marked A. B. C. D. and made a part of this report, and after personally viewing the premises and controversy herein, and after hearing the arguments of counsel, the complainant being represented at the several hearings by Messrs. Allen & Dowling, Judge C. Kellar and Bibb & Bibb as his Counsel, and the defendants by Judge R. E. Evans and W. D. Funk as their Counsel. And after due consideration thereof respectfully report the following findings of facts.

1. That at the time of the commencement of the action the complainant was a resident of the state of Virginia and the defendants residents of Nebraska.

53 2. That the complainant John H. Friederichsen on and prior to the 12th day of March, 1908, was a resident of the county of Knox in the state of Nebraska and was the owner of 240 acres of land in said county, described as the north east quarter of section six and the north half of the north west quarter of section eight in township twenty nine north, range three west of the sixth principal meridian, the land mentioned in the complainant's petition.

3. The complainant who was a married man was at the time living upon the premises with his family as their home.

4. The defendant Mary C. Gilmore was on and prior to said 12th day of March, 1908, the owner of two hundred and ninety eight acres of land situated in the county of Louisa and state of Virginia and near the Village of Louisa Court House; and known as the "Walnut Shade" or "Gates Place", the premises mentioned and described in complainant's petition.

5. That on the 12th day of March, 1908, the defendant Renard as the agent of the defendant Mary C. Gilmore, entered into a contract in writing with the complainant John H. Friederichsen and Adela Friederichsen his wife, whereby it was agreed that the complainant and wife should convey to the defendant Renard the said Knox County land to be figured and taken at the sum of \$70 per acre or \$16,800 and the Virginia land to be taken in exchange there for at the sum of \$42.50 per acre or \$12,665, the deed to the Knox county land to be executed and delivered to the defendant Renard as the grantee therein on or before the 20th day of March, 1908.

6. That on the 18th day of March, 1908, in compliance with the said agreement, the complainant and wife executed and delivered to the defendant Renard a deed in fee simple to said Knox county land, the defendant Renard being 54 made the grantee in said deed and thereupon on the day of July, 1912, and in exchange [therefore] a deed to the said Virginia land was made and delivered to complainant.

7. That at the time of making the said agreement the defendant Renard was acquainted with said Virginia land and the value of the same, and the complainant at said time was unacquainted with the said land never having been in the state of Virginia, nor had he any knowledge of the condition, nature, or value of the same, except as obtained from defendant Renard.

8. That at the time of making the said exchange the said Knox county land was worth the sum of \$60 per acre or \$14,400 and the Virginia land not to exceed the sum of \$15 or \$4,470.

9. That after making the exchange and on or about the first of April, 1908, the complainant with his family moved to the state of Virginia and upon said land where he re-

mained until about the month of February, 1909, when he returned with his family to Knox County, Nebraska, where he now resides.

10. That complainant was induced to make the said exchange in reliance upon the statements and representations of the defendant Renard, made at and prior to the time of the execution of said agreement and deed as to the nature, location, productiveness and value of said Virginia lands, that said Virginia lands were of the value of \$50 per acre and would produce two crops each year and upon which lands were houses and other improvements of a certain kind, which statements were material and were false and misleading and did deceive and mislead the complainant and did induce the complainant to make the said exchange and that the complainant was thereby damaged.

55 11. That defendant Renard was personally interested in making the said sale and exchange as the defendant Mary C. Gilmore was at the time largely indebted to Renard and the proceeds of the sale or exchange due said Gilmore were retained by said Renard and the title to the said Knox county land taken in his name and is now held by him and the transaction was made largely for the benefit of said Renard, who was a party in interest and who determined the terms and conditions of the agreement although made in the name of Mary C. Gilmore by himself as agent for said Gilmore.

12. That complainant is and was at the time of making the exchange a man below the average in mental ability.

13. That at the time of the exchange there was a mortgage upon the Knox county land of \$5,000 which defendant Renard assumed and agreed to pay off and the amount of same was deducted from the price as agreed upon for said land. And upon said Virginia land there was a mortgage or trust deed of some \$4000 which complainant paid off by giving a new mortgage thereon for \$4000 to the party holding said lien and that the balance found by the parties to be due the complainant in the exchange after deducting the amount of the said mortgage was the sum of \$3050 which was then paid by said Renard to complainant. That defendant Renard has not paid off the said \$5000 mortgage on the said Knox county land, or returned to complainant his note evidencing the indebtedness for which said mortgage was given to secure, nor has he returned to complainant or cancelled or caused to be cancelled the said notes which are still outstanding.

14. That the Virginia lands were sold in proceedings foreclosing the said \$4000 mortgage for a sum insufficient to pay said mortgage debt, and said lands were wholly lost to complainant thereby.

15. That no demand was made by complainant for a [re-cission] or annulment of the contract before the commencement of the action.

16. That after taking possession of said Virginia land and after time for discovering the condition and value of said land had elapsed and after the commencement of the action to rescind the contract, the complainant cut down a large amount of the timber then growing on said land.

17. That the sum of \$3050 found due the complainant in the exchange and which was paid by the defendant Renard to complainant has not been refunded nor has complainant offered to pay back the same or any part thereof but still retains said sum of money.

18. That complainant has sustained damages by reason of the acts and doing aforesaid of the defendant Edward Renard and Mary C. Gilmore in the sum of \$5880 as follows; loss of the 240 acres of Knox county land of the value of \$60 per acre or \$14,400, less the value of Defendants interest in the Virginia land which was worth \$15 per acre or \$4,470 less the amount of the encumbrance thereon of \$4000 leaving defendants interest in said land of \$470 together with the assumption by the defendant Renard of the \$5000 mortgage on the Knox county land, and also the \$3050 paid complainant as a balance due in the exchange leaving complainants damage sustained as aforesaid in the sum of \$5880.

And as conclusions of law:

1. That the complainant by reason of his failure to restore or offer to restore to defendants the proceeds received from defendants for said Knox county land is not entitled to a rescission of the said agreement or to a restoration to him of said land.

2. That complainant is entitled to a judgment against the defendant Edward Renard and Mary C. Gilmore for his damages so as aforesaid sustained in the sum of \$5880 and the costs of this action taxed in the sum of \$..... and further that a judgment of \$5000 be rendered against the defendant Edward Renard and in favor of complainant for the amount of the mortgage indebtedness assumed by said Renard of \$5000 on the Knox

county land. Said judgment of \$5000 however to become null and void and of no force or [affect] whatever upon the said Renard paying the said mortgage indebtedness, or by returning to complainant his note which said mortgage was given to secure or by cancelling or causing to be cancelled and filed with the clerk of this court the said note or notes within 90 days from the final entry of judgment in the case. The said judgments to be and remain a lien upon the said Knox county land for the payments of the same. And now on this 15th day of August 1912 appeared before me the undersigned Master in Chancery pro hac vice, at my office in Norfolk. The parties in the above entitled action the [complainant] by his counsel Messrs. Allen & Dowling and Calvin Kellar and the defendants by their counsel judge R. E. Evans and W. D. Funk and to the finding and judgment of the said Master in Chancery as contained in the above and foregoing report, objected to said report which exceptions were reduced to writing and filed by me and made a part of the proceeding before said Master.

The exceptions of the complainant being marked exhibit one, and made a part of this report, and the exceptions of defendant Edward Renard being marked exhibit two and the exceptions of defendant Mary C. Gilmore marked exhibit three all of said [exception] are herewith returned and made a part of this report. And thereupon the said 58 [exception] of the complainant were presented to the Master and after due consideration were overruled to which ruling this complainant duly excepted.

And the said [exception] of the defendant Renard were presented and overruled to which ruling said defendant excepted. And the [exception] of defendant Mary C. Gilmore were then presented and overruled to which ruling said defendant excepted.

Respectfully submitted.

ISAAC POWERS,
Master in Chancery, Pro Hac Vice.

(Order, December 19, 1913, vacating and setting aside Master's Report and transferring Cause to Law Side of Docket.)

This case having been submitted to the Court upon the pleadings and evidence, the Court finds that the complainant, by his own voluntary act in cutting from the timber

upon the Virginia lands received by him in exchange for lands held by him in Nebraska—the amount of timber so cut consisting of at least some thirteen or fourteen hundred logs—has, by such action, prevented defendants being placed in *statu quo*, and such action being a ratification of the sale on the part of complainant, that complainant is not entitled to equitable relief, his remedy for the alleged fraud committed upon the part of defendants being one at law; that by Equity Rule No. 22, it is provided,—

“If, at any time, it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.”

It is therefore ordered that the Master’s report be vacated and set aside and said action be and it is transferred to the law side of the court; and that complainant and respondents file amended pleadings, to conform with an action at law.

Defendants further except to the order and judgment of the Court transferring the action to the law side of the court, and defendants each and severally request that the Court find for and enter a decree dismissing complainant’s bill for want of equity; which request is by the Court overruled, to which defendants each severally except.

WM. H. MUNGER,
Judge.

60 (Order, September 25, 1913, fixing Time for Defendants to Plead.)

Before Judge Thos. C. Munger.

Now, on this 25th day of September, 1913, this being one of the days of the regular September term, 1913, of this Court, this cause coming on for hearing on the application of the defendants for leave to plead, and the Court being fully advised, it is

Ordered, that the defendants plead to the Bill of the plaintiff filed herein, within 60 days from this date, to which order the plaintiff excepts.

Amended Petition.

Filed in the District Court on September 25, 1913.

John H. Friederichsen, Plaintiff,

vs.

Edward Renard, In his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, Defendants.

For the facts constituting his cause of action against the defendant, the plaintiff alleges:

1. That at the time this case was commenced in this court, to-wit: September 22, 1908, the plaintiff John H. Friederichsen was a resident and citizen of the state of Virginia and the defendants Edward Renard, Mary C. Gilmore and W. J. Gilmore, first name unknown were respectively residents and citizens of the state of Nebraska.

61 2. That this case was commenced on the equity side of this court and was referred to a Master in Chancery by an order of the Court heretofore made, who after a full hearing made a final report herein, but on the 15th day of September, 1913, the case was by an order of this court duly entered of record, transferred to the law side of the court under Equity Rule No. 22, and it was then directed by said order that the plaintiff and defendants file amended pleadings to conform with an action at law, and this amended petition is filed in compliance therewith.

3. That on the 19th day of March, 1908, and for many months prior thereto, the plaintiff was the owner of the northeast quarter of section six (6) and the north half of the north west quarter of section eight (8), both in township twenty-nine (29) north, range six (6) west of the 6th principal meridian in Knox county, Nebraska, containing two hundred forty (240) acres of highly cultivated and improved land, of the value of \$70 per acre, or a total value of \$16,800; subject however, to a mortgage of \$5000 heretofore given by the plaintiff and his wife to the defendant Edward Renard, and a mortgage of \$3345.69 heretofore given to F. H. Crahan, cashier of the Citizens State Bank at Bloomfield, Nebraska, of which bank the defendant Edward Renard was then and now is president.

4. That on said last named date and for many months prior thereto, the defendant Mary C. Gilmore, wife of the defendant W. J. Gilmore, real name unknown, and the mother-

in-law of the defendant Edward Renard, was the owner of two hundred ninety eight acres of land near the village of Louisa Court House, Virginia, variously known as Walnut Shade, the Gates Place, etc. of the value of \$5 per acre, in which the defendant Edward Renard had a financial interest, and described as follows, to-wit: All that certain 62 tract piece or parcel of land, situate, lying and being in the county of Louisa, state of Virginia, on both sides of the main county road leading from Louisa to Trevilians depot adjoining the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandemark, Henry & Isaac Poindexter, Elias Jackson and Chas. Danne, Jr. and being a part of the land of which the late A. A. Gates, died, seized and possessed, known as "Walnut Shade" and containing 298 acres to be the same more or less.

5. And the plaintiff avers that for more than a year prior to the 12th and the 19th days of March, 1908, the defendant Edward Renard, having a financial interest as aforesaid in said Virginia land, and knowing that the plaintiff had implicit confidence in him the said Edward Renard, and was ignorant and lacking in business education and business qualifications and had no knowledge whatever of said Virginia land, and well knowing that the plaintiff had thitherto been adjudged insane and for a time theretofore had been incarcerated in the hospital for the insane at Norfolk, Nebraska, and having full knowledge of the plaintiff's said Knox county, Nebraska, land, its location, fertility and state of cultivation, development and improvement, and that the plaintiff was entirely ignorant of the condition, fertility, value and state of development and improvement of said Virginian land, and of climatic conditions and farming customs in the state of Virginia, and well knowing that the plaintiff would implicitly rely on any statements that he, the said defendant Edward Renard, might make to him, the plaintiff, for the purpose of concealing his intent and purpose and pretending to act and calling himself the agent of said Mary C. Gilmore, his mother-in-law, and her husband W. J. Gilmore, and pretending to be entirely disinterested in the transactions commenced negotiating with the plaintiff to exchange 63 said Virginia land for the plaintiff's said Knox County, Nebraska land on the basis of \$70 per acre for the plaintiff's said land and \$42.50 per acre for said Virginia land. And that pursuant to said purpose he, the said defendant, Edward Renard, for many months prior to the 12th day of March, 1908, falsely, fraudulently and well knowing his [representations] and statements to be

untrue, represented and stated to the plaintiff that said Virginia land consisted of three hundred (300) acres worth \$55 per acre, when as a matter of fact, as the said defendant Edward Renard well knew, it consisted of only two hundred ninety-eight (298) acres of the value of \$5 per acre; that 200 acres of said Virginia land had been fallow for two years, when as a matter of fact there never were 200 acres of said land in cultivation or capable of being cultivated, now had 200 acres of said land been fallow for two years; that said Virginia land was in a high state of cultivation, and a part of it contained timber of great value, when as a matter of fact it was not in a high state of cultivation and did not contain timber of value, but on the contrary said land was grown up to underbrush, scrub oak, broom straw, sassafras bushes and weeds of no value but of positive detriment thereto, necessitating in order to cultivate any part of it, the grubbing and clearing of the entire place at great expense, and that each and all of said representations and statements of the said defendant Edward Renard, to the plaintiff were, when made, false and untrue as he, the said Edward Renard, then well knew and were made by him, the said Edward Renard to the said plaintiff for the specific purpose of cheating, wronging and defrauding the plaintiff out of his said Knox county land, but were believed by the plaintiff at said time and times and were relied upon by him in entering into a contract and making an exchange of said land as hereinafter stated.

64 6. And the plaintiff further avers that the said defendant Edward Renard at said time and times well knowing the same to be false and untrue, further falsely and fraudulently represented and stated to the plaintiff that the said Virginia land would and did produce from 50 to 75 bushels of corn to the acre, when as a matter of fact he knew that it would not under any circumstances produce to exceed 8 or 10 bushels per acre; that said Virginia land would produce from 20 to 45 bushels of wheat per acre, which statement was known to him to be false and untrue when made; that it would produce from 50 to 60 bushels of oats per acre, when as a matter of fact it would not produce to exceed from 3 to 5 bushels per acre as he, the said Edward Renard at the time well knew; that the timber ground on said Virginia land was in blue grass which would pasture from 40 to 45 head of cattle the year around, when as a matter of fact it was not in blue grass nor would it pasture any number of cattle, as he, the said Edward Renard then and there

well knew; that said Virginia land was free from rocks and stones, when as a matter of fact it abounded with [ro-k] and stones of every description, size and character, surface and other rocks, which he, the said defendant Edward Renard well knew at the time he made said statements and representations; that there was a gravel bed in one corner of said timber land which was highly valuable and that gravel therefrom was selling at the pit for fifteen cents per load, when as a matter of fact there was no market for said gravel for fifteen cents per load or for any other sum as he, the said defendant, Edward Renard well knew at the time of making said statement and representations; that the soil of the entire Virginia land was of red clay of great value, when as a matter of fact the soil thereof was not red clay but of a different composition and entirely worthless and unproductive, as he the said defendant Edward Renard well knew at the time of making said statement and representations.

7. And the plaintiff further avers that the said defendant Edward Renard falsely represented and [state-] to the plaintiff on said 12th day of March, 1908, and for some months prior thereto, that there was a five acre orchard on said Virginia land; that there were 30 acres of timothy and clover hay thereon which would cut from 3 to 5 tons per acre; that the adjoining lands were worth from \$50 to \$60 per acre; that there was a barn on said land 60x64 feet with a basement which would accommodate 40 cows, or head of cattle; that there was a newly painted 12 room dwelling house in good condition with a basement or cellar thereunder; that the plaintiff could dispose of everything he could raise on said Virginia land to good advantage; that butter was selling for 45 cents per pound and eggs for 45 cents per dozen; that the said Virginia land was located only 40 miles from Washington in the District of Columbia and one and a half miles from the village of Louisa Court House; that \$300 worth of machinery, a blacksmith outfit, cow and hog would be left on the place for the plaintiff; that one man in Virginia could do as much work as three in Nebraska as the plaintiff would be able to work the year round, and made other like statements to the plaintiff for the purpose of inducing the plaintiff to make and enter into a contract of exchange of his said Knox County land for said Virginia land, all of which said statements and representations of the said defendant Edward Renard were false and untrue at the time they were made to the plaintiff, as he, the said Edward Renard well knew, and were made by him to the plaintiff for the purpose of inducing the

plaintiff to enter into a contract for and make an exchange of his said Knox County, Nebraska, land for said Virginia land.

66 8. And the plaintiff still further avers that each and all of said statements and representations of the said defendant Edward Renard were false and untrue as he, the said Edward Renard, then and there well knew, and that they were made by him to the plaintiff for the sole and express purpose of persuading and inducing the plaintiff to enter into a contract for and to make an exchange of his said Knox county land for said Virginia land, which he did on said date, and that in entering into said contract and in making a deed to the said Edward Renard for his said Knox county, Nebraska, land, the plaintiff relied upon and believed said representations and statements of the said Edward Renard to be true and would not have entered into said contract or have made said deed but for his belief in the truthfulness thereof.

9. The plaintiff avers that the said defendant, Edward Renard for the purpose of influencing the plaintiff to enter into said contract of March 12, 1908, and making an exchange of said lands, by and through the instrumentality of a person or persons to the plaintiff unknown, for sometime prior to March 12, 1908, [harrassed], distressed and disturbed the plaintiff and his family and caused the plaintiff's stable and barn to be broken into and an attempt made to take his horses and cattle therefrom and caused the shooting of guns in and around the plaintiff's premises for the purpose of putting the plaintiff in fear and in a frame of mind to enter into said contract and of causing the plaintiff to deed his said Knox county, Nebraska, land to the said defendant Edward Renard and to accept a deed to said Virginia land and remove from the state of Nebraska to the state of Virginia.

10. The plaintiff further avers that his said Knox county, Nebraska, land was at the time of making said representations, contract and deed, of the fair and full value of 67 \$70 per acre, or \$16,800, and that the said Virginia land did not exceed in value the sum of \$5 per acre or \$1490, and that there was a difference in the value of said tracts of land of \$15,310 in favor of the plaintiff.

11. That on the 19th day of March, 1908, the plaintiff and the defendant Edward Renard in his own right and as the professed agent of his co-defendants Mary C. Gilmore and W. J. Gilmore, real name unknown, made and entered into a written instrument, purporting to be a contract, by the terms of which the plaintiff agreed to take from the said Ed-

ward Renard said Virginia land as a tract of [\$]300 acres for the sum of \$42.50 per acre, or a total of \$12,750 and to take up a \$4000 mortgage thereon and to execute a new mortgage in lieu thereof to Jason C. Ayres, the mortgagee, at the sum of \$42.50 per acre, or \$12,750, and to execute a deed to the said defendant Edward Renard for his, the plaintiff's said Knox county, Nebraska, land subject to the mortgages thereon herein stated, or for the consideration of \$16,800; and pursuant thereto the plaintiff and said Edward Renard carried out said transaction, the plaintiff and his wife executing to the said Edward Renard a deed for the plaintiff's said Knox county, Nebraska, land and receiving from the defendants Edward Renard, Mary C. Gilmore and W. J. Gilmore, real name unknown, a deed for said Virginia land, the plaintiff executing a mortgage thereon for \$4000 to said Jason C. Ayres of Dixon, Illinois, as aforesaid.

12. That pursuant to their purpose to wrong, cheat and defraud the plaintiff in the premises, the said defendant did not execute to the plaintiff a deed for said Virginia land until July 1, 1908, after the plaintiff and his family had removed to and taken up their residence in the state of Virginia.

13. And the plaintiff further avers that by reason of the fraud so practiced upon him as aforesaid and as a direct and proximate consequence thereof, he was induced to lay 68 out and expend and did lay out and expend, the sum of \$2000 in moving his family, household effects, farm implements, animals, etc., from Knox county, Nebraska, to Louisa county, Virginia, and in returning the same therefrom to the state of Nebraska.

14. That by reason of the premises the plaintiff has sustained damages in the sum of \$13,345 together with 7 per cent thereon from the 19th day of March, 1908, which sum, together with said interest, is now due the plaintiff from the defendants and wholly unpaid.

Wherefore, the plaintiff prays judgment against the said defendants for said sum or \$13,345 with 7 per cent interest thereon from the 19th day of March, 1908, together with costs of suit.

W. C. BIBB,
J. H. BERRYMAN AND
WILLIAM V. ALLEN,
Attorneys for Plaintiff.

The State of Nebraska,
Madison County—ss.

William V. Allen, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled case; that he is acquainted with the contents of the foregoing pleading; that the plaintiff is absent from Madison county, Nebraska, and this affidavit is made for and in his behalf, and that the facts and statements contained in the foregoing pleading are true as affiant verily believes.

WILLIAM V. ALLEN.

Subscribed in my presence and sworn to before me this 22d day of September, 1913.

(Seal)

ED FRICKE, Notary Public.

My Commission expires Dec. 3, 1914.

69 (Motion of the Defendant, Edward Renard, to strike Amended Petition, filed in the District Court on November 12, 1913.)

Comes now the defendant Edward Renard and moves the court to strike the amended petition filed herein for the following reasons:

1. Because it sets out a different cause of action from that one set forth in the original petition, the original cause of action being one for the disaffirmance and [re-cission] of a contract, the present cause of action being one for the affirmance of a contract and collection of damages by reason thereof of which contract the complainant has elected to rescind and has disaffirmed.

2. Because the cause of action set forth in the original petition and bill of complaint is different from and inconsistent with the alleged cause of action set forth in the amended petition filed herein.

3. Because the cause of action set forth in the amended petition is not the one permitted by the court under its order made herein.

4. Because the facts as alleged in the Bill of Complaint, the finding of the referee and the facts as found by the court in this case, and which are accepted by the plaintiff and complainant, precludes and negatives the facts necessary
70 to a successful prosecution of the case set forth in the petition or Bill of Complaint.

5. Because the evidence was all taken and the expenses of the trial so far as conducted were all incurred and the case submitted to the court upon the record so made. The only matter submitted to the court was the complainant entitled to a rescission of the contract and to the damages as found by the master and on those questions on the issues presented the court found against the complainant and the action should have been and now should be dismissed.

6. The complainant should only have been permitted to file an amended petition consistent with his original petition and then only upon the condition of payment of costs and attorney's fees.

7. That it is not possible to state a cause of action triable to the law side of the court which will not be inconsistent with the case made and relief sought in the original Bill of Complaint.

8. Because this suit as commenced was properly brought in equity and that it is only because of the acts of the plaintiff committed since the commencement of the suit that the court refused the relief asked and no law question arose or has arisen that is not incidental to the said suit in equity.

9. Because the cause of action set out in the amended petition is barred by the statute of limitations.

10. Because the amended petition filed herein is not warranted by any order made herein or by any Act of Congress or by any act of the legislature of the state of Nebraska or by any rule applicable to or governing this court.

W. D. FUNK and
R. E. EVANS,
Attorneys for Edward Renard.

71 (Motion of the Defendant, Mary C. Gilmore, to strike Amended Petition, filed in the District Court on December 17, 1913.)

Comes now the defendant Mary C. Gilmore and moves the court to strike the amended petition filed herein for the following reasons:

1. Because it sets out a different cause of action from that one set forth in the original petition, the original cause of action being one for the disaffirmance and rescission of a contract, the present cause of action being one for the af-

firmanee of a contract and collection of damages by reason thereof which contract the complainant has eleted to rescind and has disaffirmed.

2. Because the cause of action set forth in the original petition and bill of complaint is different from and inconsistent with the alleged cause of action set forth in the amended petition filed herein.

3. Because the cause of action set forth in the amended petition is not the one permitted by the court under its order made herein.

4. Because the facts as alleged in the Bill of Complaint, the finding of the referee and the facts as found by the court in this case and which are accepted by the plaintiff and complainant precludes and negatives the facts necessary
71a to a successful prosecution of the case set forth in the petition or Bill of Complaint.

5. Because the evidence was all taken and the expenses of the trial so far as conducted were all incurred and the case submitted to the court upon the record so made. The only matter submitted to the court was the complainant entitled to a rescission of the contract and to the damages as found by the master and on those questions on the issues presented the court found against the complainant and the action should have been and now should be dismissed.

6. The complainant should only have been permitted to file an amended petition consistent with his original petition and then only upon the condition of payment of costs and attorney's fees.

7. That it is not possible to state a cause of action triable to the law side of the court which will not be inconsistent with the case made and relief sought in the original Bill of Complaint.

8. Because this suit as commenced was properly brought in equity and that it is only because of the acts of the plaintiff committed since the commencement of the suit that the court refused the relief asked and no law question arose or has arisen that is not incidental to the said suit in equity.

9. Because the cause of action set out in the amended petition is barred by the statute of limitations.

10. Because the amended petition filed herein is not warranted by any order made herein or by any Act of Congress or by any act of the legislature of the State of Nebraska or by any rule applicable to or governing this court.

W. D. FUNK and
R. E. EVANS,
Atty's. for Mary C. Gilmore.

71b (Order, July 17, 1914, denying Motions to strike Amended Petition, etc.)

It appearing to the Court that several months ago an order was made in this case by the Honorable William H. Munger, the then presiding judge of this Court, directing that the pleadings herein be reformed so as to make the case an action at law instead of a suit in equity, and that at the September, 1913, term of this court held at the City of Norfolk Nebraska, the plaintiff was ordered to file his amended petition herein at law within sixty days thereafter, the Honorable T. C. Munger presiding, and that the defendants were directed to file an answer thereto within sixty days thereafter.

And it further appearing to the court that instead of answering as directed the said defendants filed separate motions to strike the plaintiff's amended petition from the files but have neglected to bring the same to the attention of the court and have it ruled upon,

And it further appearing that the Honorable William H. Munger and Thomas C. Munger, Judges of this court, are unable at this time to take up and consider said motion and make the necessary orders in the premises, and that
72 the Honorable Smith McPherson has been legally designated to sit and act herein in the place of said judges, and that this case has been pending for many years and ought to be at issue on the merits to the end that it may be tried at the September term to be held at the city of Norfolk Nebraska, on the 21st day of September, 1914, and that the defendant's motions is without merit:

It is therefore ordered by the court that the said separate motions of the defendants is denied, to which ruling said defendants severally except.

And it is further ordered by the Court that the defendants shall answer to the merits of this case within twenty days from a receipt by their counsel of a copy of this order, and that they shall serve a copy of their answer, or answers, upon

counsel for the plaintiff at the time of filing the same, and that the plaintiff shall have fifteen days thereafter within which to reply, serving a copy of said reply upon counsel for the defendants.

July 17, 1915.

SMITH McPHERSON, Judge.

73 Answer of the Defendant, Edward Renard, to Amended Petition, filed in the District Court on August 25, 1914.

Comes now the defendant Edward Renard, and not waiving any of the objections and exceptions heretofore urged against filing of the amended petition of the plaintiff but still insisting upon such objections and exceptions and motion to strike said petition and saving to himself all and all manner of benefits of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the Bill of Complaint and amended petition heretofore filed and to the rulings, judgments and decree heretofore entered, for answer to the amended petition or so much thereof as is material or necessary to be answered, this defendant alleges and states to the court:

I.

That this court has no jurisdiction over the person of this defendant as to the alleged cause of action set forth in the amended petition filed in this court on the 25th day of September, 1913.

II.

This defendant admits that the original bill of complaint was filed in this court on the 22nd day of September, 1908, and that at said time John H. Friederichsen was a resident and citizen of the State of Virginia but this defendant alleges and states that on the 25th day of September, 1913, at the time of the filing of the amended petition filed by the said 74 complainant against the defendants, and which states an entirely different cause of action from that set forth in the said bill of complaint, the said John H. Friederichsen was a citizen of and residing within the State of Nebraska; that this answering defendant is and at all times mentioned herein has been a citizen of the State of Nebraska and that the said defendant, Mary C. Gilmore now Mary C. Methven

is and at the time of the filing of said amended petition was a citizen of the State of California and that the said W. J. Gilmore the defendant was dead; that no service of any process of this court has ever been made under the cause of action set forth in the said amended petition upon either of the defendants herein; this defendant denies that the case as presented in the amended petition was commenced until said amended petition was filed, to-wit: on the 25th day of September, 1913; this defendant admits that the case as set forth in the bill of complaint filed on the 22nd day of September, 1908, was commenced on the equity side of this court and was referred to a Master in Chancery but denies that this case was duly transferred to the law side of the court and alleges that said transfer was without any application therefor by either or any party to said suit and was without authority and irregularity made and that at this time the law side of the court has no authority or jurisdiction over said cause of action set forth in the bill of complaint and that the alleged cause of action set forth in the amended petition filed on the 25th day of September, 1913, is a distinct and different cause of action from that set forth in the said Bill of Complaint.

III.

That on the 22nd day of September, 1908, at the time of the commencement of the case against this defendant by the complainant in this court it was properly commenced
75 and brought on the equity side of the court and was a suit brought to rescind the contract attempted to be described in paragraph 11 of the plaintiff's amended petition being Exhibit K of the original Bill of Complaint and that at said time, if the allegations as made in the bill of complaint filed in the case were true as therein alleged, that said plaintiff was entitled to the decree therein asked for and that said case was not improperly brought on the equity side of the court but was properly brought there and was an action for the rescission of the said contract and the relief prayed for was appropriate and proper and was designed to and would have placed the parties in *statu quo*.

That issue was joined between the complainant and the defendant and that evidence was taken under the issue so joined and that it was found by the Master in Chancery and also by this court that the plaintiff was not entitled to the relief asked for under said bill because he, the said John H. Friedericksen, the complainant, after instituting a suit for the rescission of the said contract and after a full disclosure

to his attorney, had gone upon said land in Virginia and has cut over 1400 logs thereon, being the young growing timber thereon and that by reason of such conduct on the part of the plaintiff and the destruction of said timber, after he had commenced the said action, he had placed it beyond his power to restore to the defendants the property he had received and that the said complainant for that reason was not entitled to the relief prayed for and that by reason of the severing of said timber the owner of the mortgage on said land instituted foreclosure proceedings which the said Friederichsen permitted to go to sale without notice to either of the defendants and which the Master in Chancery found as an additional

76 reason for refusing the relief prayed in the Bill of Complaint; the defendant alleges that it was not because said action was improperly commenced on the equity side of the court that the order was made transferring the cause to the law side of the court but it was because the plaintiff's conduct after the filing of his bill of complaint had deprived him of the right of any relief on the equity side of the court, such actions and conduct of the plaintiff all having been subsequent to the filing of the original bill or complaint in this case and all of such conduct and actions so preventing the ordering or granting of the relief asked was after he had employed all of his present counsel in the case, and after the complainant and all of his attorneys were cognizant of all of the facts in the case, including the cutting and destruction of said timber and the foreclosure and sale of said lands under the mortgage given by the said John H. Friederichsen, and after said facts were pleaded by the defendants in 1909, said complainant still proceeded with said trial and sought to secure a rescission of said contract and the deed executed thereunder.

IV.

That the bill of complaint filed in this action asked and prayed for a rescission and [cancellation] of said contract and repudiated the terms and provisions of said contract and asked and prayed for a cancellation of the deeds made and for the delivery of the possession of the said land in Knox County, Nebraska, to the complainant; that the present action seeks to recover damages on said contract so repudiated and for which rescission and cancellation was asked and that the relief now sought under the amended petition is wholly inconsistent with the relief sought in the action set forth in the original bill of complaint, the original bill of

77 complaint seeking to repudiate, cancel and rescind the contract between parties hereto and the present amended petition seeking to recover upon and under

the terms of the said contract so repudiated and is a new cause of action wholly different from that set forth in the original bill of complaint and wholly different and inconsistent with the relief that the plaintiff had at all times prior to the 15th day of September, 1913, prayed for, having insisted upon and demanded rescission of the contract and deed executed in the month of March, 1908.

V.

That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and by his attorneys prior to the 22nd day of September, 1908 when action was commenced and prior to the first day of September, 1908, and that more than five years had elapsed after full knowledge by said plaintiff and his attorneys of all of the facts and alleged [fraudulent] representations and since the plaintiff cut and destroyed said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of action set forth in the amended bill of complaint is barred by the statute of limitations.

VI.

That the permission to file the present amended petition and to sue for the alleged damage set forth in said amended petition was never granted on any application of the plaintiff or his attorneys or either of them and is not the relief sought for by the plaintiff or his attorneys in any application ever made in this court, or any other, prior to the filing of said amended petition, all of the applications for relief made or filed prior to the 15th day of September, 1913, by the said John E. Friederichsen in this action and court having been for the rescission of said contract and damages necessary to place the complainant back on his said
78 farm in Knox County, Nebraska.

VII.

This defendant, not waiving any of the objections to the jurisdiction of this court over either the parties or the subject matter of the action as presented in said amended petition and not waiving any of the matters of defense heretofore set forth but still urging the same, this defendant for answer to the matter set forth in the amended petition alleges and states to the court that on the 12th day of March, 1908, the plaintiff and his wife entered into a contract with

the defendant, Mary C. Gilmore Methoven through this defendant as agent for said Mary C. Gilmore and in no other capacity for the exchange of the lands described in paragraph 3 of said amended petition then owned by the plaintiff and the lands described in paragraph 4 of said amended petition and then owned by the said Mary C. Gilmore, a copy of said contract being made a part of the original bill of complaint being therein called Exhibit K; that on said 12th day of March, 1908, the plaintiff's said lands were encumbered by a mortgage in about the sum of \$8345.69 and interest, and the lands of the said Mary C. Gilmore were encumbered in the sum of about \$4800.00 and that by the terms of said contract the said land in Virginia was to be taken with a mortgage incumbrance thereon on \$4000.00 and which was to be and was given by the complainant the said John H. Friederichsen; that the land in Knox county was to be taken by the defendant, Mary C. Gilmore with a mortgage incumbrance of \$5000.00 and the same to be paid by her; that by the terms of said agreement in making said exchange, the price of the lands of the complainant, the said John H. Friederichsen, was placed at the sum of \$16,800.00 and the price of the lands of the said Mary C. Gilmore Methven was placed at the sum of \$12,750.00 and the difference in the value of said lands, (after deducting the said

79 incumbrance), to-wit: the sum of \$3050.00, was paid to the said John H. Friederichsen and has ever since been retained by him; that at the time of the said exchange of said lands the real or actual value of the said lands of the said John H. Friederichsen was not to exceed the sum of \$13,200.00 and the value of the said lands of the said Mary C. Gilmore was at least the sum of \$8940.00. That between the 19th day of March and the 1st day of April, 1908, and when there had been no change in the value or condition of said properties, the said parties, after full and complete knowledge of all of the conditions and facts and after view of the Virginia land, carried into effect the said contract without objection and as agreed upon. That said exchange was in all things fair and equitable and carried out by said parties in conformity with the terms of said contract and without objection by either of the parties thereto; this defendant denies that the said John H. Friederichsen had implicit confidence in this answering defendant or that he relied upon the statement of any person or of this answering defendant or that he was ignorant or lacking in business education or business qualification but alleges and states to the court that said John H. Friederichsen was a German

farmer of more than average ability who had been successful in his chosen occupation; this defendant admits that on February 22, 1902 said John H. Friederichsen was adjudged insane and was confined in the Hospital at Norfolk until September 27, 1902 when he was discharged as cured and alleges that his delusion was jealousy as to and of his wife and that at no time was his business acumen affected or impaired and that at all the times mentioned during which negotiations were conducted between said John H. Friederichsen and this defendant for said Mary C. Gilmore or between said John H. Friederichsen and any of the defendants, the said John H. Friederichsen was in full possession of his mental faculties and a shrewd German

farmer; this defendant denies that he began negotiations with the said John H. Friederichsen but states the fact to be that said Friederichsen first came to this defendant seeking to exchange or purchase land; that this defendant denies that he stated there was 300 acres of land but states that before any exchange was effected, made or completed the said John H. Friederichsen knew that there was 298 acres of land in said Virginia tract of land and so knowing completed said exchange; this defendant denies that he made any representations to the said Friederichsen as to any fact relative to said Virginia land not true; this defendant alleges that 200 acres of said land has been cultivated and is capable of cultivation; this defendant denies that he represented that 200 acres of said land had been fallow 2 years or that it was in a high state of cultivation but states the fact to be that he informed the said John H. Friederichsen that over 100 acres of land formerly cultivated had not been cultivated for years; this defendant denies that he said or represented that the said Virginia land would produce from 50 to 75 bushels of corn per acre but alleges and states the fact to be that portions of said land has produced at the rate of more than 60 bushels of corn to the acre; this defendant denies that he said or represented to the said John H. Friederichsen that said land would produce from 20 to 50 bushels of wheat per acre and alleges that said land properly farmed will produce from 12 to 25 bushels of wheat to the acre; this defendant denies that he said or represented that said Virginia lands would produce from 50 to 60 bushels of oats to the acre but this defendant alleges that said lands if properly tilled, cultivated and farmed would and did produce from 10 to 20 bushels of oats per acre; this defendant denies that he said or represented that said timber land on said tract was in blue

81 grass and would pasture from 40 to 45 head of cattle the year round; this defendant denies that he said or represented that said Virginia lands were without stone; but alleges that fact to be that much of the land has but few small stones and that none of it is rough or rocky land; this defendant admits that he said there was a gravel pit upon said farm and alleges that such is the fact but denies that he said there was a market for said gravel at 15 cents per load; this defendant denies that he said the entire tract was of a red soil of great value but this defendant alleges that a portion of said tract has a red soil and a portion has a gray soil and that said soil is of the average character of land in that vicinity; this defendant admits that he said there was an orchard of about 5 acres and alleges and states that such is the fact that there is more than 5 acres of orchard; this defendant denies that he said there was 30 acres of timothy and clover upon said premises or that the same would cut from 3 to 5 tons per acre; this defendant denies that he said there was a barn upon said premises 60x64 feet that would house 40 or 45 head of cattle; this defendant admits that he said there was a twelve room house on said premises and that it had been newly painted and admits that it had not been newly painted and alleges and states to the court that there is a 12 room house on said premises and [had] had been informed that it had been painted or would be painted but denies that he made any other representations as to the condition of said house and this defendant alleges and states the fact to be that said house except as to the paint and a portion of the roof was in good condition; this defendant denies that he said or represented to said John H. Friederichsen or any other person that butter sold for 45 cents a pound or that eggs sold for 45 cents a dozen or that said lands were only 40 miles from Washington or that a blacksmith outfit worth \$300.00 was at said place; this de-

82 fendant alleges that the Village of Louisa Court House is only one and a half miles from said farm; this defendant alleges that lands adjacent to this land both easterly and westerly therefrom were at said time worth from \$50.00 to \$60.00 per acre and higher even than that; this defendant denies that he said or represented that one man in Virginia could do as much work as three in Nebraska or that the plaintiff would be able to work the year round or any other like statement and this defendant alleges that a man can work all the year round in said Louisa County, Virginia; this defendant denies each and every allegation in paragraph 9 of said amended petition as to any disturbance at or near the home of the said John H. Friederichsen in Knox County,

Nebraska or at any place having been made by him either directly or indirectly or that he was in any way instrumental in disturbing said John H. Friederichsen or his family or property; this defendant denies each and every allegation in paragraph 10 of said amended petition; this defendant denies that the contract of exchange of lands was made in March 19, 1908 as alleged in paragraph 11 of said amended petition but alleges that the same was made on March 12, 1908. This defendant denies that he made said contract in his own right but alleges that he had no right, title, interest or lien in or to the said Virginia land at the time of said exchange or at any other time and so advised the said John H. Friederichsen at the time of the making of said contract; this defendant denies that in pursuance of any purpose to cheat, wrong or defraud the said John H. Friederichsen that the defendants did not execute deed to said Virginia land until July 1st, 1908 and denies each and every allegation in paragraph 12 of said amended petition; this defendant made no representations as to any fact with reference to said real estate which was not true and that this defendant told the said John H. Friederichsen that he had never been on said tract of land but
83 twice and then but for a short time and was not familiar with the same, and before March 12, 1908 advised said John H. Friederichsen to go to Virginia and examine said land before he made said exchange or contract for the exchange.

[VII.-.]

This defendant denies that he had any financial or other interest in said Virginia land at any time and that the only capacity in which he acted was as the agent for Mary C. Gilmore who was his mother-in-law; that he made no representations as to the kind or character of said land or its environment or as tending in any way to effect the value thereof except such as had been told him by the said Mary C. Gilmore or members of her family and that whatever he said and everything he said with reference to said land as to its kind or character, location or as to the value of adjoining or adjacent lands was information received from the said Mary C. Gilmore or members of her family or people living in the vicinity of the said Virginia land or from agricultural or experimental stations near said lands or similar lands; that this answering defendant had never been upon said land but twice in his life and then only for a short time being not to exceed forty hours and had made nothing but casual examination of a portion of said Virginia land and that this answering defendant so ad-

vised the said John H. Friederichsen both as to his source of information and his lack of knowledge of conditions in said Louisa County, Virginia and as to said lands prior to the 12th day of March, 1908 and prior to the execution of said contract and requested the [—] Friederichsen to go and examine said land before entering into any contract touching the same; that this answering defendant had loaned money to the said Mary C. Gilmore but that he had no security therefor in any way effecting the said Virginia land or any other land-
84 or property, the evidence of said indebtedness being preserved only by way of a note or notes or account.

IX.

This defendant denies each and every allegation in said amended petition not herein expressly admitted or otherwise answered.

Wherefore, this defendant prays that the plaintiff's cause of action may be dismissed; that he may go home without day, that he may recover his costs herein expended, and for such other and further relief as may be just and equitable.

R. E. EVANS and W. D. FUNK,
Defendant's Attorneys.

State of Nebraska,
County of Knox—ss.

Edward Renard, being first duly sworn on his oath deposes and says that he is the answering defendant above described and that he has read the foregoing answer and that same is true as he verily believes.

EDWARD RENARD.

Subscribed and sworn to before me, in my presence by the said Edward Renard, this 20 day of August 1914.

(Seal)

H. F. FRIEDRICHSEN,
Notary Public.

84a Answer of the Defendant, Mary Gilmore Methven, to Amended Petition, filed in the District Court on August 25, 1914.

Comes now the defendant, Mary Gilmore Methven, and not waiving any of the objections and exceptions heretofore urged against the filing of the amended petition of the plaintiff but still insisting upon such objections and exceptions and motion to strike said petition and saving to herself all

and all manner of benefits of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the Bill of Complaint and amended petition heretofore filed and to the rulings, judgments and decree heretofore entered, for answer to the amended petition or so much thereof as is material or necessary to be answered, this defendant alleges and states to the court;

I.

That this Court has no jurisdiction over the person of this defendant as to the alleged cause of action set forth in the amended petition filed in this court on the 25th day of September, 1913.

II.

This defendant admits that the original bill of complaint was filed in this court on the 22nd day of September, 1908 and that at said time John H. Friederichsen was a resident and citizen of the State of Virginia but this defendant alleges and states that on the 25th day of September, 1913, at the time of the filing of the amended petition filed by 84b the said complainant against the defendants, and which states an entirely different cause of action from that set forth in the said bill of complaint, the said John H. Friederichsen was a citizen of and residing within the State of Nebraska; that the defendant Edward Renard is and at all times mentioned herein has been a citizen of the State of Nebraska, and that this answering defendant Mary C. Gilmore now Mary C. Methven is and at the time of the filing of said amended petition was a citizen of the State of California and that the said W. J. Gilmore the defendant was dead; that no service of any process of this court has ever been made under the cause of action set forth in the said amended petition upon either of the defendants herein; this defendant denies that the case as presented to the amended petition was commenced until said amended petition was filed, to-wit: on the 25th day of September, 1913; this defendant admits that the case as set forth in the bill of complaint filed on the 22nd day of September, 1908, was commenced on the equity side of this court and was referred to a Master in Chancery, but denies that this case was duly transferred to the law side of the court and alleges that said transfer was without any application therefor by either or any party to said suit and was without authority and irregularly made and that at this time the law side of this court has no authority or jurisdiction over said cause of action set forth in the

bill of complaint and that the alleged cause of action set forth in the amended petition filed on the 25th day of September, 1913 is a distinct and different cause of action from that set forth in the said Bill of Complaint.

III.

That on the 22nd day of September, 1908, at the time of the commencement of the case against this defendant by the complainant in this court it was properly commenced 84c and brought on the equity side of the court and was a suit brought to rescind the contract attempted to be described in paragraph 11 of the plaintiff's amended petition, being Exhibit K of the original Bill of Complaint and that at said time, if the allegations as made in the bill of complaint filed in the case were true as therein alleged, that said plaintiff was entitled to the decree therein asked for and that said case was not improperly brought on the equity side of the court but was properly brought there and was an action for the rescission of the said contract and the relief prayed for was appropriate and proper and was designed to and would have placed the parties in *statu quo*.

That issue was joined between the complainant and the defendants and that evidence was taken under the issue so joined and that it was found by the Master in Chancery and also by this court that the plaintiff was not entitled to the relief asked for under said bill because he, the said John H. Friederichsen, the complainant, after instituting a suit for the rescission of the said contract and after a full disclosure to his attorney, had gone upon said land in Virginia and had cut over 1400 logs thereon, being the young growing timber thereon and that by reason of such conduct on the part of the plaintiff and the destruction of said timber, after he had commenced the said action, he had placed it beyond his power to restore to the defendants the property he had received and that the said complainant, for that reason was not entitled to the relief prayed for and that by reason of the severing of said timber the owner of the mortgage on said land instituted foreclosure proceedings which the said Friederichsen permitted to go to sale without notice to either of the defendants and which the Master in Chancery found as an additional reason for refusing the relief prayed for 84d in the Bill of Complaint; this defendant alleges that it was not because said action was improperly commenced on the equity side of the court that the order was made transferring the cause to the law side of the court but it was because the plaintiff's conduct after the filing of his bill of complaint had deprived him of the right to any relief

on the equity side of the court, such actions and conduct of the plaintiff all having been subsequent to the filing of the original bill of complaint in this case and all of such conduct and actions so preventing the ordering or granting of the relief asked was after he had employed all of his present counsel and attorney in the case, and after the complainant and all of his attorneys were cognizant of all of the facts in the case, including the cutting and destruction of said timber and the foreclosure and sale of said lands under the mortgage given by said John H. Friederichsen, and after said facts were pleaded by the defendants in 1909, said complainant still proceeded with said trial and sought to secure a rescission of said contract and the deeds executed thereunder.

IV.

That the bill of complaint filed in this action asked and prayed for a rescission and cancellation of said contract and repudiated the terms of the provisions of said contract and asked and prayed for a cancellation of the deeds made and for the delivery of the possession of the said land in Knox County, Nebraska, to the complainant; that the present action seeks to recover damages on said contract so repudiated and for which rescission and cancellation was asked and that the relief now sought under the amended petition is wholly inconsistent with the relief sought in the action set forth in the original bill of complaint, the original bill of complaint seeking to repudiate, cancel and rescind the contract between the parties hereto, and the present amended petition seeking

to recover upon and under the terms of the said
84e contract so repudiated and is a new cause of action
wholly different from that set forth in the original bill
of complaint and wholly different and inconsistent with the
relief that the plaintiff had at all times prior to the 15th day
of September, 1913, prayed for, having insisted upon and
demanded a rescission of the contract and deed in the month
of March, 1908.

V.

That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and by his attorneys prior to the 22nd day of September, 1908 when said action was commenced and prior to the first day of September, 1908, and that more than five years had elapsed after full knowledge by said plaintiff and his attorneys of all of the facts and alleged fraudulent rep-

resentations, and since the plaintiff cut and destroyed said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of action set forth in the amended bill of complaint is barred by the statute of limitations.

VI.

That the permission to file the present amended petition and to sue for the alleged damage set forth in said amended petition was never granted on any application of the plaintiff or his attorneys or either of them and is not the relief sought for by the plaintiff or his attorneys in any application ever made in this court, or any other, prior to the filing of said amended petition, all of the applications for relief made or filed prior to the 15th day of September, 1913, by the said John H. Friederichsen in this action and court having been for the rescission of said contract and damages necessary to place the complainant back on his said farm in Knox

84f county, Nebraska.

VII.

This defendant, not waiving any of the objections to the jurisdiction of this court over either the parties or the subject matter of the action as presented in said amended petition and not waiving any of the matters of defense heretofore set forth but still urging the same, this defendant for answer to the matter set forth in the amended petition alleges and states to the court that on the 12th day of March, 1908, the plaintiff and his wife entered into a contract with this defendant Mary C. Gilmore Methven through the defendant Edward Renard as agent for this answering defendant, and in no other capacity, for the exchange of the lands described in [paragrapj] 3 of said amended petition, then owned by the plaintiff, and the lands described in paragraph 4 of said amended petition, and then owned by this answering defendant, a copy of said contract being made a part of the original bill of complaint being therein called exhibit K; that on said day of March, 1908, the plaintiff's said lands were encumbered by a mortgage in about the sum of \$8345.69 and interest and the lands of this answering defendant were encumbered in the sum of about \$.....; that by the terms of said contract the said land in Virginia was to be taken with a mortgage incumbrance thereon of \$4000.00 and which was to be and was given by the complainant the said John H. Friederichsen; that the land in Knox county was to be taken by this defendant with a mortgage incumbrance of \$5000.00 and the same to be paid by her; that by the terms of said agree-

ment in making said exchange, the price of the lands of the complainant, the said John H. Friederichsen, was placed at the sum of \$16,800.00 and the price of the lands of this answering defendant was placed at the sum of \$12,750.00 and the difference in the value of said lands, (after deducting the

84g said incumbrance), to-wit: the sum of \$3050.00, was paid to the said John H. Friederichsen and has ever

since been retained by him; that at the time of the said exchange of said lands the real or actual value of the said lands of the said John H. Friederichsen was not to exceed the sum of \$13,200.00 and the value of the said lands of this answering defendant was at least the sum of \$8940.00. That between the 19th day of March and the 1st day of April, 1908, and when there had been no change in the value or condition of said properties, the said parties, after full and complete knowledge of all of the conditions and facts and after view of the Virginia land, carried into effect the said contract without objection and as agreed upon. That said exchange was in all things fair and equitable and carried out by said parties in conformity with the terms of said contract and without objection by either of the parties thereto; this defendant denies that the said John H. Friederichsen had implicit confidence in said Edward Renard, the defendant, or that he relied upon the statement of any person or of said Edward Renard, defendant, or that he was ignorant or lacking in business education or business qualification but alleges and states to the court that the said John H. Friederichsen was a German farmer of more than average ability who had been successful in his chosen occupation; this defendant admits that on February 22, 1902, said John H. Friederichsen was adjudged insane and was confined in the Hospital at Norfolk until September 27, 1902, when he was discharged as cured and alleges that his delusion was jealousy as to and of his wife and that at no time was his business acumen affected or impaired and that at all the times mentioned during which negotiations were conducted between said John H. Friederichsen and this defendant for said Mary C. Gilmore or between said John H. Friederichsen and any of the defendants, the said John H. Friederichsen was in full possession of

84h his mental faculties and a shrewd German farmer; this defendant denies that the said Edward Renard began negotiating with the said John H. Friederichsen but states the fact to be that said Friederichsen first came to said Renard seeking to exchange or purchase land; that this defendant denies that the said Renard stated there was 300 acres of land but states that before any exchange was effected, made or completed the said John H. Friederich-

sen knew that there was 298 acres of land in said Virginia tract of land and so knowing completed said exchange; this defendant denies that the said Renard made any representation to the said Friederichsen as to any fact relative to said Virginia land not true; this defendant alleges that 200 acres of said land has been cultivated and in capable of cultivation; this defendant denies that the said Renard represented that 200 acres of said land had been fallow 2 years or that it was in a high state of cultivation but states the fact to be that he the said Benard informed the said John H. Friederichsen that over 100 acres of land formerly cultivated had not been cultivated for years; this defendant denies that the said Renard said or represented that the said Virginia land would produce from 50 to 75 bushels of corn per acre but alleges and states the fact to be that portions of said land has produced at the rate of more than 60 bushels of corn to the acre; this defendant denies that the said Renard said or represented to the said John H. Friederichsen that said land would produce from 20 to 50 bushels of wheat per acre and alleges that said land properly farmed will produce from 12 to 25 bushels of wheat to the acre; this defendant denies that the said Renard said or represented that said Virginia lands would produce from 50 to 60 bushels of oats to the acre but this defendant alleges that said lands if properly tilled,

84i cultivated and farmed would and did produce from 10 to 20 bushels of oats per acre; this defendant denies

that the said Renard said or represented that said timber land on said tract was in blue grass and would pasture from 40 to 45 head of cattle the year round; this defendant denies that the said Renard said or represented that said Virginia lands were without stone; but alleges that fact to be that much of the land has but few small stones and that none of it is rough or rocky land; this defendant admits that the said Renard said there was a gravel pit upon said farm and alleges that such is the fact but denies that the said Renard said there was a market for said gravel at 15 cents per load; this defendant denies that the said Renard said the entire tract was of a red soil of great value but this defendant alleges that a portion of said tract has a red soil and a portion has a gray soil and that said soil is of the average character of land in that vicinity; this defendant admits that the said Renard said there was an orchard of about 5 acres and alleges and states that such is the fact and that there is more than 5 acres of orchard; this defendant denies that the said Renard said there was 30 acres of timothy and clover upon said premises or that the same would cut from 3 to 5 tons per acre; this defendant denies

that the said Renard said there was a barn upon said premises 60 to 64 feet that would house 40 or 45 head of cattle; this defendant admits that the said Renard said there was a twelve room house on said premises and that it had been newly painted and admits that it had not been newly painted and alleges and states to the court that there is a 12 room house on said premises and the said Renard had been informed that it had been painted or would be painted but denies that said Renard made any other representations as to the condition of said house and this defendant alleges and

84j states the fact to be that said house except as to the paint and a portion of the roof was in good condition; this defendant denies that the said Renard said or represented to said John H. Friederichsen or any other person that butter sold for 45 cents a pound or that eggs sold for 45 cents a dozen, or that said lands were only 40 miles from Washington or that a blacksmith outfit worth \$300.00 was at said place; this defendant alleges that the Village of Louisa Court House is only one and a half miles from said farm; this defendant alleges that lands adjacent to this land both easterly and westerly therefrom were at said time worth from \$50.00 to \$60.00 per acre and higher even than that; this defendant denies that the said Renard said or represented that one man in Virginia could do as much work as three in Nebraska or that the plaintiff would be able to work the year round or any other like statement and this defendant alleges that a man can work all the year round in said Louisa county, Virginia; this defendant denies each and every allegation in paragraph 9 of said amended petition as to any disturbance at or near the home of the said John H. Friederichsen in Knox county, Nebraska or at any place having been made by the said Edward Renard or this answering defendant either directly or indirectly or that either was in any way instrumental in disturbing said John H. Friederichsen or his family or property; this defendant denies each and every allegation in paragraph 10 of said amended petition; this defendant denies that the contract of exchange of lands was made on March 19, 1908 as alleged in paragraph 11 of said amended petition but alleges that the same was made on March 12, 1908. This defendant denies that the said Renard made said contract in his own right but alleges that he had no right, title, interest or lien in or to the said Virginia land at the

time of said exchange or at any any other time and
84k so advised the said John H. Friederichsen at the time
of the making of said contract; this defendant denies
that in [pursuant] of any purpose to cheat, wrong or defraud

the said John H. Friederichsen, that the defendant did not execute the deed to said Virginia land until July 1st, 1908, and alleges that said deed was executed and delivered long prior thereto and that the plaintiff after he had been upon the land in question accepted the deed thereto and caused the same to be recorded in deed records of said Louisa County, and denies each and every allegation in paragraph 12 of said amended petition; this defendant made no representations either by herself or said Renard as to any fact with reference to said real estate which was not true and that the defendant, Renard told the said John H. Friederichsen that he had never been on said tract of land but twice and then but for a short time and was not [vamiliar] with the same and before March 12, 1908 and advised said John H. Friederichsen to go to Virginia and examine said land before he made said exchange or contract for the exchange.

VIII.

This defendant denies that the said Renard had any financial or other interest in said Virginia land at [-at] time and that the only capacity in which he acted was as the agent for the answering defendant who was his mother-in-law; that the said Renard made no representations as to the kind or character of said land or its environment or as tending in any way to effect the value thereof except such as had been told him by this answering defendant or members of her family and that whatever he said and everything he said with reference to said lands as to its kind or character, location or as to the value of adjoining or adjacent lands was information received from this answering defendant or mem-

bers of her family or people living in the vicinity of
84-1 the said Virginia land or from agricultural or experi-

mental stations near said lands or similiar lands; that said Renard the defendant had never been upon said land but twice in his life and then only for a short time being not to exceed.....hours and had made nothing but casual examination of a portion of said Virginia land and that said Renard so advised the said John H. Friederichsen both as to his source of information and his lack of knowledge of conditions in said Louisa County, Virginia and as to said lands prior to the 12th day of March 1908 and prior to the execution of said contract and requested the said Friederichsen to go and examine said land before entering into any contract touching the same; that said Renard had loaned

money to this answering defendant but that he had no security therefor in any way effecting the said Virginia land or any other land or property, the evidence of said indebtedness being preserved only by [was] of a note or notes or account.

IX.

This defendant denies each and every allegation in said amended petition not herein expressly admitted or otherwise answered.

Wherefore, this defendant prays that the plaintiff's cause of action may be dismissed; that he may go home without day, that he may recover his costs herein expended, and for such other and further [relied] as may be just and equitable.

R. E. EVANS,
W. D. FUNK,
Defendant's Attorneys.

State of Nebraska,
County of Knox—ss.

W. D. Funk being first duly sworn on his oath deposes and says that he is attorney for the answering defendant above described who is now absent from the state and that he has read the foregoing answer and that same is true as he verily believes.

W. D. FUNK.
Subscribed and sworn to before me, in my presence by the said Edward Renard this 26 day of August, 1914.

(Seal)

H. F. FRIEDRICHSEN, Notary Public.

85 (Motion to strike Parts of Answers, filed in the District Court on August 31, 1914.)

Now comes the plaintiff and moves the Court as follows:

1. To strike out paragraph one (1) of the respective answers of the defendants Edward Renard and Mary C. Gilmore Methven, because the same is redundant and irrelevant matter and inserted therein to the prejudice of the plaintiff.
2. To strike out all that part of the second (2) paragraph of each of said answers beginning with the words in the fourth (4) line on page one (1) thereof, as follows: "But this defendant alleges and states that on the 25th day of

September, 1913, etc." to the conclusion of the said paragraph because the same is redundant and irrelevant matter and inserted in said answers to the prejudice of the plaintiff, and confuses the issues of the case.

3. To strike out all that part of paragraph three (3) of said answers on pages two (2), three (3) and four (4) thereof beginning with the words on page two (2) of Edward Renard's answer and page three (3) of Mary Gilmore Methven's answer, "and that at said time, if the allegations as made in the bill of complaint, etc.," to the conclusion thereof, because the same is redundant and irrelevant
86 matter inserted therein to the prejudice of the plaintiff and confuses the [iss-es] of the case.

4. To strike out paragraph four (4) of said answers found on page four (4) of the answer of Edward Renard and on pages four (4) and five (5) of the answer of Mary Gilmore Methven, because the same is redundant and irrelevant matter inserted therein to the prejudice of the plaintiff and confuses the issues of the case.

5. To strike out the words "is barred by the statute of limitations" in paragraph five (5) of said answers, because the same is redundant and irrelevant matter and states a legal conclusion and is inserted in said answers to the prejudice of the plaintiff.

6. To strike out paragraph six (6) of said answers because the same is redundant and irrelevant matter and inserted therein to the prejudice of the plaintiff, and the same states a mere conclusion of law.

7. To strike out the following words in paragraph seven (7) of said answers: "This defendant, not waiving any of the objections to the jurisdiction of this court over either the parties or the subject-matter of the action as presented in said amended petition and not waiving any of the matters of defense heretofore set forth, but still urging the same", because the same is redundant and irrelevant matter inserted therein to the prejudice of the plaintiff.

8. And the plaintiff moves the court to enter an order requiring the respective defendants to forthwith reform and file their said respective answers by [eliminating] all unnecessary and confusing allegations as to the history of the case, or otherwise, while pending on the equity side of the court and

to state their respective defenses negative and affirmative in clear and unambiguous language without unnecessary recitals and repetitions, historical or otherwise.

WILLIAM V. ALLEN,
Attorneys for Plaintiff.

87 (Order on Motion to strike Parts of Answers, September 16, 1914.)

This case having come on for hearing on the motion to strike out certain parts of the answers of the defendants Edward Renard and Mary C. Gilmore Methven, respectively, to the amended petition of the plaintiff, and the court having taken the same under advisement with leave to the respective parties to submit written statements and briefs in support thereof and in opposition thereto, and notice of that fact having been served upon their counsel in writing that they could not be heard personally, or in any other way owing to the ill health of the judge and the business to be transacted in court, and that said case would be taken up and considered by the court at any time after the 10th of September 1914, and that the parties having submitted said motion and their respective briefs, and each party having filed written arguments;

Now on consideration of said motion, it is ordered and directed by the court that the same be and is hereby sustained as to assignments one, two, three, four, five, six and seven thereof respectively, and denied as to assignment eight thereof, to which the respective parties except; and all matters and things appearing in the respective answers of the said defendants Edward Renard and Mary C. Gilmore

88 Methven to the plaintiff's amended petition to which said paragraphs one, two, three, four, five, six and seven of said motion are directed, are hereby stricken out, and assignment eight thereof is denied, to which the parties respectively except.

And it is further ordered and directed that the plaintiff shall reply to the remainder of said respective answers within five days after the entry of this order and serve a copy of the reply on counsel for said defendants.

And it further appearing to the court that this case has been pending for a number of years and ought to be tried at the approaching September term to begin and be helden at the city of Norfolk, Nebraska, commencing on the 21st day

of September 1914, and that a notice of trial has been properly filed and served by the plaintiff; it is further ordered that said case be and the same is hereby set down for trial at said term, to which the respective defendants except.

Done and ordered of record this September 16, 1914.

SMITH McPHERSON,
Judge.

(Order denying Application of Defendants for Leave to file
Plea in Abatement.)

Norfolk, Nebraska, Sept. 21, 1914.

September Term, 1914.

Monday morning.

In the United States District Court for the District of Nebraska, Norfolk Division.

Present: Hon. Page C. Morris, Judge. Hon. Wm. P. Warner, U. S. Marshal. Hon. F. S. Howell, U. S. Attorney. R. C. Hoyt, Clerk.

Pursuant to Statute, the September, 1914 Term of said Court was duly opened and thereupon the following, among other proceedings, were had and done, to-wit:

89 John H. Friederichsen, Plaintiff,
No. 26 "A" vs. Journal Entry.
 Edward Renard, et al., Defendants.

Now on this 21st day of September, A. D. 1914, it being of the regular September, 1914 Term of said Court, Honorable Page C. Morris, Judge, presiding, upon application of defendant in open Court, by attorney R. E. Evans, for leave to file plea in abatement, it is—

Ordered, by the Court, that leave to file plea in abatement be, and the same hereby is refused, to which the defendants except.

Trial for above cause is hereby set for November 4th, 1914, 9 o'clock A. M. at Norfolk.

Bill of Exceptions.

Filed in the District Court on March 24, 1915.

Be It Remembered, that on the 22nd day of September, 1908, the plaintiff John H. Friederichsen, by his solicitors

Messrs. Bibb & Bibb, of Louisa Court House, Virginia, filed his bill of complaint in this case in the office of the clerk of the Circuit Court of the United States of America for 90 the District of Nebraska, Norfolk Division, against the said Edward Renard, in his own right and as agent for Mary C. Gilmore (now Mary C. Gilmore Methven), and Mary C. Gilmore and W. J. Gilmore, as defendants.

On said 22nd day of September, 1908, a subpoena in chancery was issued in this case in due form and manner of law by the clerk of said circuit court for said defendants; and on the 30th day of September, 1908, the said subpoena in chancery herein was duly served on each of said defendants by W. P. Warner, United States Marshal for said district of Nebraska, in Knox county, Nebraska, and a return of service thereof was duly made and filed in the office of said clerk of said circuit court on the 6th day of October, 1908.

On the 29th day of December, 1908, the defendant Edward Renard filed in the office of the clerk of said circuit court his separate answer to the plaintiff's said bill of complaint, and on the said 29th day of December, 1908, the defendant Mary C. Gilmore (Methven) filed her answer to said bill of complaint in the office of the clerk of said circuit court; and on the same day the defendant W. J. Gilmore also filed his separate answer to said bill of complaint.

On the 6th day of November 1908, Messrs. W. D. Funk of Bloomfield, Nebraska, and R. E. Evans of Dakota City, Nebraska, filed their written appearance in this case in the office of the clerk of said court as solicitors and counsel for said respective defendants.

That on theday of January 1909, the plaintiff filed in the office of the clerk of said circuit court, his replication to said separate answers of the defendants Edward Renard, Mary C. Gilmore (Methven) and W. J. Gilmore.

On the 2nd day of April, 1908, the defendant Edward Renard filed in the office of the clerk of said circuit court 91 his amendment to his said answer to said bill of complaint, and on the same day the defendant Mary C. Gilmore (Methven) filed in said Clerk's office an amendment to her said answer to said bill of complaint.

On the 15th day of April 1909, the plaintiff filed in the office of the clerk of said circuit court his replication to the amendments to the answers of said defendant Edward Renard and said Mary C. Gilmore (Methven).

On the 31st day of July, 1911, the defendant Edward Renard filed in the office of the clerk of said circuit court, his second amendment to his answer to the bill of complaint herein, and on the same day the defendant, Mary C. Gilmore (Methven), then Mary C. Gilmore, filed in said Clerk's office her second amendment to said bill of complaint.

On the 24th day of December 1912, the defendant Edward Renard filed in the office of the clerk of this court, a motion for permission to file an amended and supplemental answer to the bill of complaint herein, which was granted by the court, and on the same day the said Edward Renard did file such amended and supplemental answer, and on the same day the defendant Mary C. Gilmore (Methven), filed a motion for leave to file an amended and supplemental answer to the bill of complaint herein, which was granted, by the court and the same was filed the same day.

And on the 25th day of September 1913, in compliance with the foregoing order of the court, the plaintiff John H. Friederichsen filed in the office of the clerk of this court his amended petition herein.

On the 26th day of July 1914, there was filed in the office of the clerk of this court in this case a written acknowledgement of the service on defendants' counsel of a copy of the foregoing order of the Honorable Smith McPherson, Judge, made in this case on the 17th day of July 1914.

92 On the 25th day of August 1914, the defendant Edward Renard filed in the office of the clerk of this court his answer to the plaintiff's amended petition herein, and on the same day the defendant Mary C. Gilmore (Methven) the said Mary C. Gilmore having remarried) filed in the office of the clerk of this court her answer to the plaintiff's amended petition.

On the 18th day of September, 1914, the plaintiff filed in the office of the clerk of this court, his reply to the answers of the defendants Edward Renard and Mary C. Gilmore (Methven) to the amended petition herein,

And Be It Further Remembered, that on the 21st day of September 1914, it being a judicial day of the regular September 1914, term of this court held in the city of Norfolk, Nebraska, the Honorable Page C. Morris sole presiding judge, the defendants Edward Renard and Mary C. Gilmore Methven, by and through Mr. R. E. Evans one of their attorneys in this case in open court respectively asked oral permission of the court to withdraw their respective answers

and file pleas in abatement instanter setting up those things which had been [striken] from the respective answers of the said defendants to the amended petition on the motion of the plaintiff, which request upon the oral objection of counsel for plaintiff, was refused and an order was entered in words and figures following, to-wit:

Sept. 21, 1914, Defts. application in open court for leave to file plea in abatement refused. Defts. except. Trial set for Nov. 4, 1914, at 9 o'clock.

To which ruling of the court the said defendants respectively excepted.

And on the 4th day of November 1914, it being a judicial day of the regular September 1914 term of this court, adjourned to that date, this case being called for trial, the Honorable Thomas C. Munger sole presiding judge, the defendants each separately for themselves made and entered the following objections thereto:

93 [Comes] now the defendants Edward Renard and Mary C. Gilmore for [himself] and [objects] to the impaneling of a jury in this case for the following reasons:

1. That under the pleadings, the evidence, the findings of the Master and of the Court and from the entire record this action should be dismissed.
2. Because this action was not and is not one covered by rule 22 of the equity rules and was not properly transferred.
3. That no application has ever been made by any party to this action seeking or asking for its transfer to the law side of the court.
4. Because no process of this court has ever been served upon the defendant or either of the defendants under the cause of action stated in the amended petition.
5. Because the cause of action stated in the amended petition filed herein is a new cause of action from that stated in the original bill of complaint filed herein, the cause of action set forth in the amended petition being for damages upon a contract, or an action for deceit; the cause of action set forth in the original bill of complaint being an action to rescind the contract on the ground of fraud, the former action being one for deceit, affirming the contract, the latter an action to have the contract declared void.

6. Because the original cause of action and relief prayed for in this original bill of complaint being that of a rescission of the contract on the ground of alleged fraud and is inconsistent with the relief sought and the judgment prayed for in the amended petition, and the plaintiff having elected to pursue the former remedy is precluded by such election from now obtaining relief in this case.

7. Because under the record heretofore made in this case, the evidence and findings of both the Master and the court, the plaintiff is not entitled to judgment.
94

Which said objections were overruled and said defendants severally excepted thereto.

A jury consisting of twelve good and lawful men was then duly impaneled and sworn according to law and counsel for the respective parties made their opening statements to the jury, and now at this time and point in the trial of the case to the jury, the defendants Edward Renard and Mary C. Gilmore Methven) each for [himself] entered the following objections to the introduction of any evidence in this case, to-wit:

Now [comes] the [defendant-] Edward Renard and Mary C. Gilmore, each for [himself] and [objects] to the introduction of any evidence in this case for each of the following reasons:

1. That under the pleadings, the evidence, the findings of the Master and of the court, and from the entire record this action should be dismissed.
2. Because this action was not and is not one covered by rule 22 of the equity rules and was not properly transferred.
3. That no application has been made by any party to this action seeking or asking for its transfer to the law [said] of the court.
4. Because no process of this court has ever been served upon the defendant or either [or] the defendants under the cause of action stated in the amended petition.
5. Because the cause of action stated in the amended petition filed herein is a new cause of action from the cause of action set forth in the amended petition, being for damages upon a contract, or an action for deceit; the cause of action set forth in the original bill of complaint being an action to

rescind the contract on the ground of fraud, the former action being one for deceit, affirming the contract, the latter an action to have the contract declared void.

95 6. Because the original cause of action and relief prayed for in the original bill of complaint being that of a rescission of the contract on the ground of alleged fraud and is inconsistent with the relief sought and the judgment prayed for in the amended petition, and the plaintiff having elected to pursue the former remedy is precluded by such election and from now obtaining relief in this case.

7. Because under the record heretofore made in this case, the evidence and findings of both the Master and the court, the plaintiff is not entitled to judgment.

8. Because more than four years have elapsed since the discovery of the alleged fraud and prior to the filing of the amended petition in this case.

9. Because the facts disclosed by the pleadings in this case are not sufficient to entitle the plaintiff to a judgment against the defendants, or either of them.

Which said objections were overruled by the court to which ruling the defendants each separately excepted.

And thereupon the attorneys for the respective parties made and entered into an oral stipulation in open court in the words and figures following, to-wit:

It is agreed by counsel for the respective parties that on and prior to the 12th day of March, 1908, the plaintiff John H. Friederichsen was the owner and in possession of the Knóx county, Nebraska, land described in the petition, the 240 acres subject to incumbrance amounting approximately to \$7000 or \$8000. It is also agreed that at that time the defendant Mary C. Gilmore Methven, impleaded in this case as Mary C. Gilmore, was the owner of 298 acres of Louisa county, Virginia, land described in the amended petition and in the bill of complaint in this case, subject to incumbrances, and that William J. Gilmore was her husband, and that William J. Gilmore has since the commencement of this action died.

96 It is admitted also that the original bill of complaint was filed on the 22d day of September 1908, and a subpoena was issued and duly served and returned in time and that at that time the plaintiff John H. Friederichsen was

a resident and citizen of the state of Virginia and that the subpoena in that case was served on October 1, 1908, and returned the 6th day of October 1908. Subpoena was served on Mary C. Gilmore October 2, 1908.

(Evidence for the Plaintiff.)

An thereupon to further maintain the issues in his behalf, the plaintiff offered and read in evidence exhibit "1" which is partly written and partly printed, purporting to be a contract made March 12, 1908, and signed by John H. Friederichsen and Adele Friederichsen, and Clara Gilmore (now Mary C. Gilmore Methven) and W. J. Gilmore by Edward Renard. It is admitted that exhibit "1" is in the handwriting of the defendant Edward Renard, except the signatures of the parties and the witnesses thereto and the name of Edward Renard is in his handwriting. Said exhibit "1" is in the words and figures following, to-wit:

This Agreement, Made in duplicate the 12th day of March, A. D. 1908, between John Friederichsen and Adala Friederichsen, party of the first part, and Clara Gilmore and W. J. Gilmore, and Edward Renard their agent of Louisa county, Virginia, parties of the second part,

Witnesseth, That said parties of the first part agree to sell and convey to said parties of the second part, for the price and upon the terms hereinafter mentioned; the following described real estate situate in the county of Knox and state of Nebraska, to-wit: The NE $\frac{1}{4}$ of section 6 and the north $\frac{1}{2}$ the northwest $\frac{1}{4}$ of section 8, township 29, range 3 west of six p. m. 240 acres more or less for the sum of \$16,800 sixteen thousand eight hundred dollars, assuming and agreeing to pay \$5000 first mortgage, \$2500 second mortgage interest to be paid on first mortgage to Meh. 1th
97 1908.

Said parties of the second part agree to purchase said real estate from said parties of the first part, and to pay parties of the first part as the purchase price for the same, the sum of \$12,750.00 twelve thousand seven hundred fifty dollars, in payments as follows: 300 acres located in Louisa county, Virginia, near town of Louisa known as the Charles and Will Gates land and now owned by Clara Gilmore and

W. J. Gilmore her husband, the purchase price is the exchanging of lands and difference paid Clara Gilmore agrees to take mortgage for \$40000.00 5% for 8 years, as payment of consideration.

But if the said sum of money or any part thereof, or any interest thereon, is not paid when the same is due, then, in that case, the whole of said sum and interest shall, and by this indenture does immediately become due and payable; or if the taxes and assessments of every nature which are assessed or levied against said premises, are not paid at the time when the same are by law made due and payable, then in like manner the whole of said sum, shall immediately become due and payable.

As soon as said purchase money and the interest thereon shall be fully paid, said part . . . of the first part agrees, upon surrender of this contract, to make, execute and deliver to said part . . . of the second part, . . . heirs, or assigns, a good and sufficient Deed of General Warranty conveying said real estate in fee simple, free of all incumbrances, except the taxes for the year A. D. 1907, and subsequent taxes and any liens created or imposed on said land by second party; and first parties further agree to furnish an abstract perfect title to said property. In case said parties of the second part shall refuse, neglect or fail to pay said purchase money and interest as above stated and agreed, or perform any of the covenants on both parties hereby entered into, time being the essence of this contract, they shall not forfeit any and all rights in 98 and to said real estate acquired under and by virtue of this agreement, and shall forfeit any money paid for the purchase of the same, unless said parties of the first part shall elect otherwise.

Said party further agrees that all buildings or improvements now upon or that may be placed upon said premises shall remain thereon until final payment for said land as per this contract.

Said parties of the second part shall be entitled to the possession of said land so long as the conditions of this agreement shall remain unbroken by both; but upon failure to comply with the same, said right of possession shall terminate, and said parties of the first part shall be entitled to the possession of said land and the improvements thereon.

Said John Friederichsen gives the right to Clara Gilmore and W. J. Gilmore to furnish deed and close title by July 1, 1908, said John Friederichsen agrees to make deed to Edward Renard of his 240 acres described above by March 20, 1908.

No assignment of this contract shall be valid without the consent of the vendor endorsed hereon.

Said parties respectively bind their heirs, assigns, and legal representatives to the faithful performance of the terms of this agreement.

In Witness Whereof, The said parties hereunto set their hands the day and year first above written.

JOHN FRIEDERICHSEN,
ADELE FRIEDERICHSEN,
CLARA GILMORE,
W. J. GILMORE,

By Edward Renard.

Signed in presence of
Milt Clark,
Hans Friederichsen.

Those parts of Exhibit "1" which are underscored or italicised herein are in writing and the remainder thereof in print.

And thereupon to further maintain the issues upon his part the plaintiff offered in evidence exhibit "2," a warranty deed from John H. Friederichsen and Adele Friederichsen dated the 19th day of March 1908, for the Knox county land described in the bill of complaint and in the amended petition, acknowledged on the same day and recorded in book 37, page 346 of the Deed records of Knox county, Nebraska, on the 20th day of March 1908. All proof was waived as to the competency of exhibit "2," but the defendants object to its introduction as immaterial, irrelevant and not tending to prove or disprove any issue in this case. Said objection was overruled, to which said defendants reserved an exception and said exhibit was received and read in evidence and is in the words and figures following, to-wit:

Know All Men by These Presents: That we, John H. Friederichsen, and Adele Friederichsen, husband and wife, of the county of Knox and state of Nebraska, for and in consideration of the sum of Sixteen thousand eight hundred

Dollars, in hand paid, do hereby grant, bargain, sell, convey, and confirm unto Edward Renard of the county of Knox and state of Nebraska, the following described real estate, situated in Columbia township in Knox county, and state of Nebraska, to-wit: The northeast quarter (NE $\frac{1}{4}$) of section six (6) and the north half (N $\frac{1}{2}$) of the northwest quarter (NW $\frac{1}{4}$) of section eight (8), all in township twenty-nine (29) north, range three (3) west of the sixth principal meridian.

Subject to a certain mortgage of Five thousand Dollars (\$5000.00) executed by grantors to Edward Renard, bearing date February 24th, 1905, and due in five years after date thereof, which said mortgage the said grantee herein assumes and agrees to pay. Together with all the tenements, hereditaments, and appurtenances thereto belonging, and we the said John H. Friederichsen and Adele Friederichsen do hereby covenant with the said Edward Renard and his heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance except 100 above mortgage; that we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Adele Friederichsen hereby relinquishes all right of dower in and to the above described premises.

Signed this 19th day of March A. D. 1908.

JOHN H. FRIEDERICHSEN,
ADELE FRIEDERICHSEN.

In Presence Of
Geo. Ballantyne.

The State of Nebraska,
Knox County—ss.

On this 19th day of March, A. D. 1908, before me Geo. Ballantyne a Notary Public duly commissioned and qualified for and residing in said county, personally came John H. Friederichsen and Adele Friederichsen, husband and wife, to me known to be the identical persons whose names are affixed to the foregoing conveyance as grantors and acknowledged the execution of this instrument to be their voluntary act and deed.

Witness my hand and Notarial seal the day and year last above written.

(Seal)

GEO. BALLANTYNE,
Notary Public

The identification and foundation being waived, the plaintiff offered in evidence as plaintiff's exhibit "3" a warranty deed from Mary C. Gilmore (Methven) and W. J. Gilmore for the Louisa county, Virginia, land described in the bill of complaint and in the amended petition herein, dated the 19th day of March 1908, and filed for record and recorded in Deed book 26 at page 232, June 11, 1908, in the Recorder's office of Louisa county, Virginia, properly acknowledged the 1st day of April 1908, which instrument is in the words and figures following, to-wit:

Warranty Deed.

This deed made this 19th day of March A. D. 1908, by and between Mary C. Gilmore, and W. J. Gilmore her husband, having been formerly known as Mary C. Haw-thorn, or otherwise Clara H. Hawthorn, intermarried with H. H. Hawthorn and since divorced from him, and before her said marriage to H. H. Hawthorn, she was known by the name of Mary C. Flatt, all of the county of Louisa, state of Virginia, parties of the first part, and John H. Friederichsen of the county of Knox, and state of Nebraska, party of the second part, Witnesseth: That for and in consideration of the sum of Twelve thousand seven hundred and fifty (\$12,750.00) Dollars, cash in hand paid by the party of the second part to the said party of the first part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged the said party of the first part does hereby grant and convey with general covenants of warranty of title unto the said party of the second part, all that certain tract, piece or parcel of land, situate on both sides of the main county road leading from Louisa Court House to Trevillians depot, and adjoining the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandermark, Henry and Isaac Poindexter, Elias Jackson, and Charles Danne, Jr., being part of the land which the late A. A. Gates died seized and possessed, known as "Walnut Shade", and containing two hundred and ninety-eight (298) acres, be the same more or less.

And the said first party, Mary C. Gilmore, formerly Mary C. Flatt, covenants that she has the right to convey said land to the grantees; that the same is free from incumbrance; that the grantees shall have quiet possession of said land; that she will execute such further assurances of said lands as shall be requisite; and that she will warrant generally the property herein described.

And the said W. J. Gilmore, hereby relinquishes all contingent courtesy initiate or [consum-ate] in and to the above described premises.

Witness the signatures and seals of the said parties of the first part, this day and year first above written.

102 (Seal)
(Seal)

MARY C. GILMORE,
W. J. GILMORE.

State of Virginia,
Louisa County—ss.

I, Jas. E. Porter, a notary public, in and for the county of Louisa in the state of Virginia, aforesaid, do certify that Mary C. Gilmore and W. J. Gilmore, her husband, whose names are signed to the foregoing writing, bearing date the 19th day of March A. D. 1908, have acknowledged the same before me in my county aforesaid.

Given under my hand this 1st day of April, A. D. 1908.

JAS. E. PORTER,
Notary Public.

My [Commissioner] expires May 2nd, 1911.

JAS. E. PORTER,
Notary Public.

It is agreed between the parties that the name Clara Gilmore signed to the contract exhibit "1" refers to and is the same person as Mary C. Gilmore (Methven) one of the defendants in this case.

It is admitted by the parties that the signatures Clara Gilmore and W. J. Gilmore by Edward Renard as signed to exhibit "1" were intended to refer to and did mean Mary C. Gilmore (Methven) and W. J. Gilmore impleaded in this case as defendants.

And to further maintain the issues on his part, the plaintiff offered and read in evidence the deposition of J. J. Porter taken before James E. Porter a notary public of the state of Virginia, at the village of Louisa Court House, Virginia, on the 18th day of January 1909, as exhibit "4" as follows:

My name is J. J. Powers, 73 years old, clerk of the court of Louisa county, and live at Louisa, Virginia. Have been connected with the clerk's office and the clerk of the court for 54 years, except the period during the war. I have been

engaged in the real estate business in Louisa county, Virginia, about 25 years. I am the same Porter of the firm 103 of Porter & Gates, real estate agents at Louisa Court House Virginia. I think I am acquainted with the value of farm land in Louisa County, Virginia. I do know the place in Louisa County known as the old Woods or Gates place on which Mr. Friederichsen now lives and have ever since a boy. I think the fair value of said place in March 1908, as a farm was from \$1500 to \$1800. I should say the dwelling house on the farm is between two and a half and three miles from Louisa Court House, Virginia. I should say the farm is from three or three and a half miles from the public school building at Louisa, Virginia. I am at the present time the keeper of the assessor's books of the county of Louisa, Virginia. The assessed value of the land and buildings to which I have referred in the years 1890, 1895, 1900 and 1905, is as follows: In 1890, buildings \$200, land and buildings at \$750. In 1895, buildings \$143.25, land and buildings at \$726.25. In 1900, buildings \$400, land and buildings at \$987. In 1905, buildings \$1000, land and buildings at \$1584.00. There has been no other assessment of land in the county since 1905. Only one assessment every five years. I haven't my books here to show that this land is assessed at the present time the same as it was in 1905, but there has been no assessment since 1905.

Q. 14. Is the land referred to above in such condition that it can be properly farmed under any manner of cultivation?

The defendants object to this question as incompetent, irrelevant and immaterial. Objection sustained, answer excluded and plaintiff excepts.

Q. 16. Do you know Mr. Edward Renard and if so, has he ever owned any land in Louisa County, Virginia?

Objected to by defendants as incompetent, immaterial and irrelevant. Objection overruled, to which said defendants except.

A. I am not acquainted with him. At a trustee sale made by myself, I sold him a place of some 300 and odd acres 104 in this county.

Q. 19. Did you sell the Gates place to the Gates when they purchased the same?

Objected to by defendants as immaterial, irrelevant and incompetent. Objection overruled by the Court and defendants except.

A. I did, as agent. If the copies of some deeds filed in this suit by Mr. Bibb, which are alleged to be recorded in my office, are certified by me, I say they are true copies of the records.

And the plaintiff offered and read, and there was received in evidence, that part of the cross-examination of the said J. J. Porter contained in his said deposition as follows:

Q. 6. Did you make any sales of such property during the year 1908, and if so at what price per acre, or if sold in gross for what amount, stating the acreage?

Objected to by defendants because the same is incompetent, immaterial and irrelevant, no proper foundation laid, the relevancy and materiality being the point particularly in mind.

The court reserved the ruling thereon.

A. I didn't sell any in 1908, a purchaser which I sold to before sold some, 194 acres for \$800.00 including buildings, there used to be, I haven't seen it for years, a very good building on it.

Q. 14. Mr. Porter do you recall having met Mr. Gilmore, one of the defendants in this action, and Mr. Friederichsen, the complainant, shortly after Mr. Friederichsen's arrival in Louisa, Va., and probably at the time they were filing the evidence of the transfer of this land?

Objected to by defendants as immaterial and irrelevant. Objection overruled, answer read and defendants except.

A. I did. I have known the place ever since I was a boy, but I haven't been upon the place for a year or so, I don't recollect when I was there.

105 At this time the Court adjourned for the day to re-convene on the 5th day of November 1914, at 9 o'clock a. m. And on the 5th day of November 1914, at 9 o'clock a. m., the court re-convened and the jury being in the jury box, and the respective parties and their counsel were present.

After the court had convened the Honorable Thomas C. Munger sole presiding judge, in open court [suggest-] to the attorneys of the respective parties that as the question of the

statute of limitations arose in the case, to save cost and expense in the event the court should hold the action was barred by the statute of limitations and either party desired to remove the case to the circuit court of appeals on writ of error, it would be advisable for the parties to enter into a stipulation as to certain facts and consent that the jury be discharged for the time being to be recalled and the court reconvened at a time to be fixed by the court, to which the attorneys for the respective parties gave their consent, and thereupon pursuant to said suggestion, the parties hereto, by and through their attorneys, respectively, made, signed and filed in the office of the clerk of the court a stipulation in writing in the words and figures following, to-wit:

(Stipulation of Certain Facts.)

Now on the 5th day of November 1914, it being a judicial day of the regular September 1914 term of this court, this case being on trial to a jury which has been duly impaneled and sworn to try the case, it is stipulated between the parties hereto that this action was commenced in this 106 court September 22, 1908, as a suit in equity by the filing of a bill of complaint; that a subpoena for the defendants was issued therein on the 22d day of September 1908, and placed in the hands of the United States Marshal for service and was served on the defendant Edward Renard as agent for Mary C. Gilmore and W. J. Gilmore, at Bloomfield, Knox county, Nebraska, on the 1st day of October 1908, in Knox county, Nebraska, and on Mary C. Gilmore and W. J. Gilmore October 2nd, 1908, in Wayne county, Nebraska, and was returned to this court October 6th, 1908; that at the time of the commencement of this case and at the time of the issuance, service and return of the subpoena, the plaintiff John H. Friederichsen was a resident and citizen of the state of Virginia and the defendants Edward Renard, Mary C. Gilmore, now Mary C. Methven, and her then husband, W. J. Gilmore, now deceased, were residents, and citizens of the state of Nebraska, residing in the Norfolk Division of the district of Nebraska; that the northeast quarter of section six, and the north half of the northwest quarter of section eight, all in township twenty-nine, range three west of the sixth principal meridian described in the bill of complaint, were on and prior to the 12th day of March 1908, the properties of the plaintiff John H. Friederichsen and located in Knox county, Nebraska, and are the same lands referred to and described in detail in the bill of complaint and the amended petition; that the following described land, all that cer-

tain tract, piece, or parcel of land situate, lying and being in the county of Louisa, state of Virginia, on both sides of the main county road leading from Louisa to Trevillians depot [adjoining] the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandemark, Henry & Isaac Poindexter, Elias Jackson and Chas. Danne, Jr., and being a part of the land of which the late A. A. Gates died seized and possessed, known as "Walnut Shade" and containing 298 acres, be the same 107 more or less, is the same land referred to in the bill of complaint and the amended petition; that the contract of exchange of these respective tracts of land as alleged in the original bill of complaint and the deeds of the respective parties have reference to the same properties and transactions, and that all of the allegations of misrepresentation, fraud, and deceit averred in the bill of complaint are the same acts of misrepresentation, fraud and deceit averred in the amended petition and no other.

It is further agreed between the parties that the plaintiff has introduced sufficient evidence to show the jurisdiction of the court and to entitle him to recover a verdict at the hands of the jury in this case, but for the question of the statute of [limi-ations], which is herein reserved for the further consideration of the court. If the court finds that the statute of limitations has barred the plaintiff's right of recovery in this case, then a verdict shall be directed for the defendants subject to the right of the plaintiff to have the same reviewed in this court and the Circuit Court of Appeals by proper proceedings, and if the court finds that the statute of limitations does not bar the prosecution of this case on the amended petition, then the trial shall proceed to the jury as though this stipulation had not been made. That the trial of this case proceeded to a Master under the bill of complaint, whose report was filed and on exceptions thereto the report was set aside, the court at the time, to-wit: September 19, 1913, entering orders in the words and figures following, to-wit:

Order.

John H. Friederichsen, Complainant,
No. 26 "A" vs.

Edward Benard, et al. Defendants.

This case having been submitted to the court upon the pleadings and evidence, the court finds that the complainant by his own voluntary act in cutting from the timber upon the

108 Virginia lands received by him in exchange for lands held by him in Nebraska—the amount of timber so cut consisting of at least some thirteen or fourteen hun-

dred [longs]—has, by such action, prevented defendants being placed in statu quo, and such action being a ratification of the sale on the part of complainant, that complainant is not entitled to equitable relief, his remedy for the alleged fraud committed upon the part of defendants being one at law; that by Equity Rule No. 22, it is provided—

"If at any time, it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential".

It is therefore ordered that the Master's report be vacated and set aside and said action be and it is transferred to the law side of the court; and that complainant and respondents file amended pleadings, to conform with an action at law.

Defendants further except to the order and judgment of the court transferring the action to the law side of the court, and defendants each severally request that the court find for and end a decree dismissing complainant's bill for want of equity; which request is by the court overruled, to which defendants and each and severally except.

WM. H. MUNGER,
Judge.

John H. Friederichsen, Complainant,
No. 26 "A" vs.
Edward Renard, et al., Defendants.

Now, on this 19th day of September, A. D. 1913, being of the regular September term of this court, this cause coming on for hearing before the court upon the order heretofore entered by the Honorable Wm. H. Munger, one of the judges of this court and it appearing that said order should now 109 be entered in this cause, it is therefore ordered that the clerk enter the order heretofore made by the Honorable Wm. H. Munger;

And said cause coming on further for hearing, the defendants Edward Renard et al, object to any order being made by this court for additional pleadings herein for the reason that the plaintiff elected to pursue the remedy of rescission and by so doing waived all right under his contract, and is not now entitled to enforce any rights under said contract, and for the further reason that the findings of the Master and the court are against the plaintiff and that decree should be now entered for the defendants dismissing this cause of action.

The defendants above named except to the said order of the said Wm. H. Munger above referred to and which is herein now entered, and except to the ruling of this court entering said order.

It is further stipulated by and between the parties hereto that the cause of action set forth in the original bill of complaint is stated in exhibit "A" hereto attached and made a part of this stipulation, which is a literal copy thereof with the endorsements and filing marks thereon; that no process was ever issued from this court on the filing of the amended petition and that all orders made in this proceeding which transferred said action or suit from the equity side to the law side of the court, have been over the objections and exceptions of the defendants and each of them, but none of the orders of the court in this case have been modified or changed, nor has any appeal or proceeding in error been taken therefrom and the same are now in full force and effect.

WM. V. ALLEN,
[Attorneys] for Complainant.

W. D. FUNK and
R. E. EVANS,
Attorneys for Defendants.

110 Exhibit "A" mentioned in the foregoing Stipulation is the Original Bill of Complaint, as the same appears in this transcript, and is not again copied, pursuant to direction of Willian V. Allen, attorney for plaintiff. (See Praecept for Transcript).

And said stipulation was by the court taken under advisement and the jury were directed by the court to return to the court room on the 24th day of March, 1915, at the hour of 9 o'clock a. m. at the call of the clerk to which time the further trial of the case was adjourned.

(Recital of Ruling of Court that Cause of Action stated in Amended Petition is barred by Statute of Limitations of Nebraska, etc.)

And Be It Further Remembered, that on the 24th day of March, 1915, at the hour of 9 o'clock a. m., the court reconvened pursuant to adjournment, the Honorable Thomas C. Munger sole presiding judge, and the trial of the case was

resumed. Whereupon the court held and ruled that the cause of action stated in the plaintiff's amended petition was barred by the statute of limitations of the state of Nebraska, and that the filing of the amended petition did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations to which holdings and rulings the plaintiff at the time duly excepted.

And thereupon the court orally over the objection of the plaintiff, instructed the jury to return a verdict for the defendants, to which ruling the plaintiff at the time duly excepted, and the jury by William R. Martin, their foreman, did accordingly return a verdict in favor of said defendants that the plaintiff had no cause of action, but the plaintiff objected to the court receiving, filing, or recording said verdict, which said objection was overruled and the plaintiff duly excepted thereto and said verdict was received, filed and recorded, to which also the plaintiff duly excepted.

Motion of Plaintiff for New Trial.

111 And thereupon on said day and before a judgment was entered upon said verdict in this case, the plaintiff filed and submitted to the court his motion for a new trial of the case in the words and figures following, to-wit:

Now comes the plaintiff by Messrs. William V. Allen, William L. Dowling, and J. H. Berryman, his attorneys, and moves the court now here to set aside the verdict of the jury and grant a new trial of this case for the following reasons:

1. Because by the order of this court, the Honorable William H. Munger presiding, entered on the 19th day of September 1913, transferring the case from the equity to the law docket and directing the complainant and respondents to file amended pleadings to conform to an action at law; and the order of this court, the Honorable Smith McPherson presiding, entered on the 17th day of July 1914, denying the motion of the respective defendants, which were in part based upon the statement that the cause of action stated in the amended petition is and was barred by the statute of limitations at the time said amended petition was filed; and by the further order of this court, the Honorable Page Morris presiding, entered on the 21st day of September 1914, denying to the respective defendants the right to file a written plea setting up inter alia the plea of the statute of limitations, said respective orders having never been vacated or set aside,

the question of the statute of limitations passed into judgment and beyond the further jurisdiction of the court, and the court, the Honorable Thomas C. Munger presiding, was without jurisdiction, or power, to disregard or set aside orders or any of them, or to permit the plea of the statute of limitations, or to sustain such a plea, or the objections of the defendants based thereon.

2. Because the court erred in ruling and holding that the cause of action stated in the plaintiff's amended petition is and was barred by the statute of limitations of the state of Nebraska, at the time said amended petition was filed,
112 and that said amended petition and the cause of action stated therein did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations.

3. Because the court erred in ruling and holding that the amended petition was filed after the statute of limitations had run and stated a new and distinct cause of action from the one stated in the original bill of complaint, or petition, and that the cause of action stated in said amended petition was barred by the statute of limitations at the time said amended petition was filed.

4. Because the court erred in ruling and holding that under the stipulation this action can not be maintained.

5. Because the court erred in instructing and directing the jury to return a verdict for the defendants.

6. Because the court erred in filing and recording the verdict of the jury.

This motion is based on the record and filed in this case and the testimony taken and the rulings of the court made on the trial of this case.

WILLIAM V. ALLEN,
WILLIAM L. DOWLING, and
J. H. BERRYMAN,
Attorneys for Complainant.

Which said motion was, upon due consideration, overruled by the court, to which ruling the plaintiff reserved an exception.

(Recital of Entry of Judgment for Defendants.)

And thereupon the same day the court entered a final judgment upon the verdict of the jury in favor of the defendants.

and against the plaintiff, adjudging that the plaintiff had no cause of action against either of said defendants and do not recover of them or either of them in the premises, and that said defendants go hence without day and recover the costs of this action against the plaintiff, amounting to the sum of \$165.04, to which final judgment, order and rulings the plaintiff at the time duly excepted.

113 (Certificate of Judge to Bill of Exceptions.)

And now in furtherance of justice and that right may be done the plaintiff, the plaintiff tenders and presents to the court the foregoing as a bill of exceptions in this case for the action of the court and prays that the same be settled and allowed and signed and filed by the court as such bill of exceptions, and made a part of the record in this case, and the same is accordingly done this 24th day of March, 1915.

THOS. C. MUNGER,
Judge of the District Court of the
United States, for the District of
Nebraska, and trial Judge in this
case.

(Judgment.)

Norfolk, Nebraska, March 24, 1915.

Adjourned September 1914 Term. Wednesday forenoon,
In the United States District Court for the District of Ne-
braska, Norfolk Division.

Present: Honorable Thos. C. Munger, Judge. Honorable
John F. Sides, Deputy U. S. Marshal. R. C. Hoyt, Clerk.

Pursuant to Statute, the adjourned September, 1914 Term
of said Court was duly opened and thereupon the following,
among other proceedings, were had and done, to-wit:

John H. Friederichsen, Plaintiff,
No. 26 "A" vs.
Edward Benard, in his own right, and as agent for Mary C.
Gilmore, and Mary C. Gilmore and W. J. Gilmore, De-
fendants.

Journal Entry.

Now on this 24th day of March A. D. 1915, at the hour of
9 o'clock A. M. the September 1914 term of this Court ad-

journed to this date, reconvened and the jury heretofore impaneled was in the box, and the trial proceeded.

114 Whereupon the court sustains the defendants' objections and motion to direct a verdict in their behalf, to which ruling the plaintiff excepts. The jury returned a verdict in favor of defendants accordingly, which is in words and figures as follows:

"Verdict for Defendant.

United States District Court, District of Nebraska, Norfolk Division.

John H. Friederichsen, Plaintiff,
No. 26 "A" vs. Docket.

Edward Renard, in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, Defendants.

Verdict.

We, the jury in the above entitled cause, find in favor of the [Defendant] Herein.

Dated this 24th day of March, 1915.

W. R. MARTIN, Foreman."

And thereupon the plaintiff objects to the receipt of the verdict by the Court, because of error in directing the verdict, which objection is overruled, to which the plaintiff excepts.

And the plaintiff also at the same time objects to the recording of the verdict, because of the error of the court in directing its verdict, which objection is overruled, to which ruling the plaintiff excepts.

It is thereupon Ordered, Adjudged and Decreed that the plaintiff's cause of action be dismissed and that defendants recover their costs herein, taxed at \$165.04.

The formal written motion of the plaintiff for a new trial is overruled, to which ruling the plaintiff excepts.

In addition to the plaintiff's formal written motion for a new trial, the plaintiff orally moved the court upon the record to grant a new trial for manifest errors committed in the trial of the case, which motion is overruled by the Court, to which ruling the plaintiff excepts. And the plaintiff 115 also moved the court to set aside the judgment for the reasons assigned in the motion for a new trial, which

motion is overruled, to which ruling the plaintiff excepts. And thereupon the plaintiff submitted a bill of exceptions which is allowed and signed by the court and made a part of the record of this case.

(Order Allowing Writ of Error, etc.)

Now on this 24th day of March, A. D. 1915, it being a judicial day of the regular September 1914, term of this court, came the plaintiff by his attorneys and filed herein and presented to the court, his petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, praying also that a transcript of the order and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of \$200.00, which shall operate as a cost bond.

By the Court,

THOS. C. MUNGER, Judge.

116 (Motion of Plaintiff for a New Trial, filed in the District Court on March 24, 1915.)

Now comes the plaintiff by Messrs. William V. Allen, William L. Dowling, and J. H. Berryman, his attorneys, and moves the court now here to set aside the verdict of the jury and grant a new trial of his case for the following reasons:

1. Because by the order of this court, the Honorable William H. Munger, presiding, entered on the 19th day of September 1913, transferring the case from the equity to the law docket and directing the complainant and respondents to file amended pleadings to conform to an action at law; and the order of this court, the Honorable Smith McPherson presiding, entered on the 17th day of July 1914, denying the motion of the respective defendants, which were in part based upon the statement that the cause of action stated in the amended petition is and was barred by the statute of limitations at the time said amended petition was filed; and by the further order of this court, the Honorable Page Morris presiding, entered on the 21st day of September 1914, denying to the respective defendants the right to file a written

plea setting up inter alia the plea of the statute of limitations, said respective orders having never been vacated or set aside, the question of the statute of limitations 117 passed into judgment and beyond the further jurisdiction of the court, and the court, the Honorable Thomas C. Munger presiding, was without jurisdiction, or power, to disregard or set aside said orders or any of them, or to permit the plea of the statute of limitations, or to sustain such a plea, or the objections of the defendants based thereon.

2. Because the Court erred in ruling and holding that the cause of action stated in the plaintiff's amended petition is and was barred by the statute of limitations of the state of Nebraska, at the time said amended petition was filed, and that said amended petition and the cause of action stated therein did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations.

3. Because the court erred in ruling and holding that the amended petition was filed after the statute of limitations had run and stated a new and distinct cause of action from the one stated in the original bill of complaint, or petition, and that the cause of action stated in said amended petition was barred by the statute of limitations at the time said amended petition was filed.

4. Because the court erred in ruling and holding that under the stipulation this action can not be maintained.

5. Because the court erred in instructing and directing the jury to return a verdict for the defendants.

6. Because the court erred in filing and recording the verdict of the jury.

This motion is based on the record and files in this case and the testimony taken and the rulings of the court made on the trial of this case.

WILLIAM V. ALLEN,
WILLIAM L. DOWLING AND
J. H. BERRYMAN,
Attorneys for Complainant

118 (Assignment of Errors, filed in the District Court on
March 24, 1915.)

The plaintiff John H. Friederichsen, in this case, in connection with his petition for a writ of error, makes and files the following assignment of errors, which he avers occurred and took place upon the trial of this case, to-wit:

1. That the Court erred in ruling and holding that the order of the court entered in this case, the Honorable William H. Munger sole judge presiding, on the 19th day of September, 1913, transferring the case from the equity to the law docket and directing the complainant and respondents to file amended pleadings to conform to an action at law; and the further order of the court, the Honorable Smith McPherson sole judge presiding, entered on the 17th day of July 1914, denying the motions of the respective defendants, which were based in part upon the statement in said motions that the cause of action stated in the amended petition is and was barred by the statute of limitations at the time said amended petition was filed, and the still later order of the court, the Honorable Paige Morris sole judge presiding, entered on the 21st day of September 1914, denying the respective defendants the right to file a written plea setting up, inter alia, the statute of limitations, were not binding upon the

court, the Honorable Thomas C. Munger sole
119 judge presiding, and could be ignored by the defendants by a collateral attack in the form of objections to the sufficiency of the amended petition, and in disregarding and setting aside said respective orders and in permitting the plea of the statute of limitations and in sustaining the objections of the respective defendants based thereon.

2. The Court erred in ruling and holding that the cause of action stated in the plaintiff's amended petition is and was barred by the statute of limitations of the state of Nebraska, at the time said amended petition was filed, and that said amended petition and the cause of action stated therein did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations.

3. The Court erred in ruling and holding that the amended petition was filed after the statute of limitations had run and stated a new and distinct cause of action from the one stated in the original bill of complaint, or petition, and that the cause of action stated in the said amended petition was barred by the statute of limitations at the time said amended petition was filed.

4. The Court erred in ruling and holding that under the stipulation this action can not be maintained.
5. The Court erred in instructing and directing the jury to return a verdict for the defendants.
6. The Court erred in receiving, filing and recording the verdict of the jury.
7. The Court erred in entering a final judgment herein in favor of the defendants and against the plaintiff, and taxing the costs of the case against the plaintiff.
8. The Court erred in overruling the plaintiff's motion for a new trial.

120 Wherefore, the said John H. Friederichsen, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Nebraska, Norfolk Division in this case entered be reversed, and that said district court be directed to grant a new trial of said case.

WILLIAM V. ALLEN.

WILLIAM L. DOWLING, and
J. H. BERRYMAN,

Attorneys for Complainant.

(Petition for Writ of Error, filed in the District Court on March 24, 1915.)

And now comes John H. Friederichsen, plaintiff herein, and says that on the twenty-fourth day of March A. D. 1915, which was a judicial day of the regular September A. D. 1914, term of this court, adjourned to said date, this court entered a final judgment herein in favor of the defendants and against this plaintiff in which final judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the plaintiff, all of which will appear more in detail in the assignment of errors which is filed with this petition.

Wherefore, your petitioner, the said plaintiff, prays that a writ of error may issue in this behalf out of the
121 United States Circuit Court of Appeals for the Eighth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and pa-

pers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals.

WILLIAM V. ALLEN.
WILLIAM L. DOWLING, and
J. H. BERRYMAN,

Attorneys for Plaintiff.

(Bond on Writ of Error, filed in the District Court on March 24, 1915.)

Know All Men By These Presents: That we, John H. Friederichsen, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendants in error, Edward Renard, in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, in the full and just sum of Two Hundred Dollars, to be paid the said defendants, their heirs, executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, or assigns jointly and severally by these presents. Sealed with our seals and dated this Twenty-fourth day of March, in the year of our Lord One Thousand nine hundred and fifteen.

122 Whereas, lately at the September 1914 term of the district court of the United States for the District of Nebraska, Norfolk Division, adjourned to March 24, 1915, in an action depending in said court, between John H. Friederichsen, plaintiff, and Edward Renard, in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, defendants, a judgment was rendered against the said John H. Friederichsen, plaintiff, and the said John H. Friederichsen has obtained a writ of error of the said court to reverse the judgment in the aforesaid action, a copy of which has been filed in the clerk's office of said court, and a citation directed to the said Edward Renard, in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that [it] the said John H. Friederichsen, plaintiff, shall prosecute said writ of error to effect and answer all damages and costs if

he fail to make good his said plea, then the above obligation to be void, else to remain in full force and virtue.

(Seal)

JOHN H. FRIEDERICHSEN,

(Seal)

UNITED STATES FIDELITY and
GUARANTY COMPANY,

By Mapes & McFarland,

Atty. in fact.

Sealed and delivered in the presence of:

Grace E. Marrall,

(Seal) O. F. Grauel.

Approved by:

Thos. C. Munger,

Judge.

The United States of America—ss.

The President of the United States of America, To the Honorable Judges of the District Court of the United States for the District of Nebraska, Norfolk Division—Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in said district court before you at the September term 1914 thereof, between John H. Friederichsen, plaintiff, and Edward Renard, in his own right and as agent for Mary C. Gilmore (Methven), and Mary C. Gilmore (Methven) and W. J. Gilmore, defendants, a manifest error hath happened to the great damage of the said John H. Friederichsen as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have said record and proceedings aforesaid at the city of St. Louis and filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the Twenty-second day of May A. D. 1915, to the end that the record and proceedings aforesaid being inspected. The United States Circuit Court

of Appeals may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Seal
U. S. Dist. Court
Dist. of Neb.
Norfolk Division

Witness the Honorable Edward D. White, Chief Justice of the United States this Twenty-fourth day of March in the year of our Lord One thousand nine hundred and fifteen, issued at office in Norfolk, Nebraska, with the seal of the district court of the District of Nebraska, Norfolk Division, and dated as aforesaid.

R. C. HOYT,
Clerk of the District Court of the United States, for the District of Nebraska.

Allowed on the 24th day of March A. D. 1915.

THOS. C. MUNGER,
Judge

Endorsed: Filed in the District Court on March 24, 1915.

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Citation.

The United States of America.

To Edward Renard, in his own right, and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, Defendants—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of St. Louis, Missouri, within sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States, for the District of Nebraska, Norfolk Division, wherein John H. Friederichsen is plaintiff in error, to show cause, if any there be, why the judgment entered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Thomas C. Munger, Judge of the District Court of the United States, for the District of Nebraska, Norfolk Division, this Twenty-fourth day of March A. D. 1915.

THOS. C. MUNGER.

Judge of the District Court of the United States, for the District of Nebraska, Norfolk Division.

128 The undersigned attorneys for the above named defendant, for and on behalf of said defendants, hereby accept and acknowledge due service of the foregoing citation this Twenty-fourth day of March A. D. 1915.

W. D. FUNK and
R. E. EVANS,

Attorneys for said Defendants.

Endorsed: Filed in the District Court on March 24, 1915.

129 (Precept for Transcript.)

The clerk of said Court will please make a transcript in this case to be transmitted to the clerk of the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to the writ of error heretofore sued out herein, containing the following documents with the date that each was filed in his office:

1. The bill of complaint.
2. The subpoena in equity with the marshal's return thereof.
3. The last answer of the defendant Edward Renard to the bill of complaint with the statement that Mary C. Gilmore (Methven) filed a like answer giving the date of filing.
4. The plaintiff's reply to said answers.
5. The order referring the case to Hon. Isaac Powers, Master Pro Hac vice.
6. The Master's report, but omit all exceptions attached to or accompanying it.
7. The court's order sustaining the defendants' exceptions to the Master's report and transferring the case to the law docket with directions to amend the pleadings.

8. The Court's order fixing the time for the parties to amend their pleadings.
9. The plaintiff's petition.
10. The motion of the defendant Edward Renard to strike the petition with the statement that the other defendant, Mary C. Gilmore (Methven) filed a like motion and the court's order overruling said motions.
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11. The defendant Edward Renard's answer to the petition with the statement that the defendant Mary C. Gilmore (Methven) filed a like answer, giving the date thereof.
12. The plaintiff's motion to strike parts of the answer and the court's order sustaining the same.
13. All proceedings and orders entered at any time during the September 1914 term of the court.
14. The bill of exceptions, but in copying the same omit exhibit "A" of the stipulation therein embraced, stating that exhibit "A" of said stipulation is the complaint as it appears in the transcript.
15. All orders and rulings of the court entered March 24, 1915.
16. The motion of the plaintiff for a new trial and the ruling thereon.
17. The final judgment of the court.
18. The appellate proceedings in their proper order.

WILLIAM V. ALLEN,
[Attorneys] for Plaintiff.

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(Clerk's Certificate to Transcript.)

United States of America,
District of Nebraska,
Norfolk Division.

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, do hereby certify that pursuant to the order of Court, and in compliance with the Praecept, a copy of which is found on pages 129 and 130 hereof, the foregoing record has been made; and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court as mentioned in said Praecept, and as indicated in the foregoing

Index, in the case of John H. Friederichsen, Plaintiff, and Edward Renard, in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, defendants, No. 26 Docket "A," Norfolk Division.

That a copy of the Citation and a copy of the Writ of Error, duly certified, have been lodged and remain in my said office as such Clerk.

Seal
U. S. Dist. Court,
Dist. of Nebraska,
Norfolk Division.

Documentary
Stamp
Cancelled
May 10, 1915.

Witness, my hand and the seal of said Court, at Norfolk, in said District, this 10th day of May, A. D. 1915.

R. C. HOYT, Clerk.
By O. F. Granel, Deputy.

Filed May 17, 1915. John D. Jordan, Clerk.

132 (Suggestion of death of Edward Renard and Voluntary appearance and request for substitution by Executor and Administrators, c. t. a.)

The United States Circuit Court of Appeals for the Eighth Circuit.

John H. Friederichsen, Plaintiff in Error,

vs.

Edward Renard in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, Defendants.

Comes now G. H. Renard, executor, Herman F. Friedericks and Charles Cook administrators with the will annexed, of the estate of Edward Renard, deceased, and suggests to the court that Edward Renard, defendant in the above entitled cause died on the 16th day of April, 1915, testate; that his will was duly proven, allowed and probated on the 21st day of May, 1915; that G. H. Renard was the executor therein named; that the said G. H. Renard was appointed executor and that Charles Cook and Herman F. Friedericks were appointed administrators with the will annexed; that said executor and administrators with the will annexed took the oath of office and filed the bond required by law which was duly approved and that letters testamentary were issued to said G. H. Renard and letters of administration with the will annexed were issued to said Charles Cook and Herman F. Friedericks on the 5th day of June, 1915.

The said G. H. Renard, executor and Charles Cook and Herman F. Friedericks administrators with the will annexed of the estate of Edward Renard, deceased, come here into court voluntarily and ask that they be admitted as and made parties to this suit as the representatives of the estate of said Edward Renard, deceased, and be permitted to defend in said action on behalf of the said estate.

R. E. EVANS,
W. D. FUNK,

Attorneys for G. H. Renard,
executor and Charles Cook and
Herman F. Fredericks, ad-
ministrators with the will
annexed of the estate of Ed-
ward Renard, deceased.

I hereby accept service of the foregoing suggestion of death and request for revivor and request that the order therein prayed for be made.

WM. V. ALLEN,
Atty. for Plaintiff in Error.

Endorsed: Filed June 29, 1915. John D. Jordan, Clerk.

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(Order of Revivor.)

United States Circuit Court of Appeals, Eighth Circuit

May Term, 1915 **Friday, July 9, 1915**

**John H. Friederichsen, Plaintiff in Error,
No. 4476**

Edward Renard, in his own right and as Agent for Mary C. Gilmore; and Mary C. Gilmore and W. J. Gilmore.

**In Error to the District Court of the United States for the
District of Nebraska.**

This Cause came on to be heard on the suggestion of the death of Edward Renard, one of the Defendants in Error in this cause, with the voluntary appearance of the executor and Administrators a. t. a. and requesting that they be substituted as Defendants in Error in the place of said Edward Renard, deceased.

On Consideration Whereof, and in pursuance of said suggestion of death and request of the legal representatives, it is now here ordered that G. H. Renard, as Executor of the Estate of Edward Renard, deceased, and Charles Cook and Herman F. Friedericks, as Administrators with the will annexed of the Estate of Edward Renard, deceased, be, and they are hereby, substituted as Defendants in Error in the place and stead of said Edward Renard, deceased, and that this cause now proceed from henceforth in the names of said substituted Defendants in Error.

July 9, 1915.

FRIEDRICHSEN

vs.

RENARD, Executor of Estate of Renard, Deceased et al.

Stipulation to Amend Transcript of Record.

United States Circuit Court of Appeals Eighth Circuit.

No. 4476.

JOHN H. FRIEDRICHSEN, Plaintiff in Error,

vs.

G. H. RENARD, as Executor of the Estate of Edward Renard, Deceased; Mary C. Gilmore, and W. J. Gilmore, Defendants in Error.

It is hereby stipulated by and between the parties hereto that on the 24th day of December A. D. 1912, on leave granted by the court, the defendant Edward Renard filed the amended and supplemental answer to which this stipulation is attached, and on the same day and under the same order the defendant Mary C. Gilmore filed an amended and supplemental answer in substance the same as said amended and supplemental answer of the said Edward Renard, and that at said time it was stipulated and agreed by and between the attorneys of the respective parties hereto which latter stipulation is lost or does not appear of record, that the replication of the complainant to the respective answers theretofore filed herein, (which appears on page 48 of the printed record) should stand as the replication to said amended and supplemental answers, and that said amended and supplemental answers and this stipulation may be printed as a part of the printed record in this action, the expense of printing the same to be borne by said defendants.

Dated this 10th day of November, A. D. 1915.

WM. V. ALLEN,
W. L. DOWLING,
Attorneys for Plaintiff in Error.

W. D. FUNK AND
R. E. EVANS,
Attorneys for Defendants in Error.

[Endorsed:] Filed Nov. 12, 1915. John D. Jordan, Clerk.

Additional Transcript of Record.

Pursuant to letters dated October 19, 22 and November 15, 1915, respectively, signed by R. E. Evans, one of the attorneys for defend-

ants in the case of John H. Friederichsen vs. Edward Renard, et al., No. 26 "A", Norfolk Division of the District Court of the United States for the District of Nebraska, the following additional transcript is made in said case, to-wit:

Be It Remembered That on the 24th day of December, A. D. 1911, there was filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Norfolk Division, amended and supplemental answer of the defendant Edward Renard, in words and figures following to-wit:

In the Circuit Court of the United States of America, for the District of Nebraska, sitting at Norfolk, Nebraska.

JOHN H. FRIEDERICHSEN, Complainant,

vs.

EDWARD RENARD, in His Own Right, and as Agent for Mary C. Gilmore, and Mary C. Gilmore, and W. J. Gilmore.

Amended and Supplemental Answer of the Defendant Edward Renard.

This defendant, Edward Renard, by leave in that behalf first had and obtained, brings this his amended and supplemental answer to the bill of complaint made against him by the complainant herein and now and at all times hereafter, saving to himself all and any manner of benefit of exceptions or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in said bill of complaint, for answer thereto or so much thereof as this defendant is advised is material or necessary for him to make answer thereto. Answering says. The defendant Edward Renard admits that the complainant John H. Friederichsen, is a citizen of the state of Virginia, that he was born in the Empire of Germany and became a citizen of the United States of America, by naturalization; that the complainant has a wife and family consisting of nine children all under twenty one years of age; that on the 25th day of February 1908, he became the owner and had conveyed to him by deed, the northeast quarter (NE $\frac{1}{4}$) of section six (6), and the north half of the northwest quarter (N $\frac{1}{2}$ NW $\frac{1}{4}$) of section eight (8), all in township twenty-nine (29) north, range three (3) west of the 6th Principal Meridian, in Knox County, Nebraska; that this defendant has executed to the complainant a quit claim deed for the aforesaid real estate, but alleges and states the fact to be that said quit claim deed was executed on the — day of —, 190—; that both of said deeds were duly recorded in the office of the county clerk of Knox County, Nebraska, that on the 23rd day of October, 1900, Mary C. Pratt, who is the same person as Mary C. Gilmore, and who is the mother-in-law of this answering defendant, became the owner, and had conveyed to her, by good and sufficient warranty deed, for a consideration of thirty-five hundred dollars, fifteen hundred dollars of which

was cash, and the balance secured to be paid by a mortgage on the property conveyed, which said property is described as follows, to-wit: All of that certain tract, piece or parcel of land situate, lying and being in the said County of Louisa, State of Virginia, on both sides of the main county road leading from Louisa Courthouse to Trevilians depot and adjoining the lands of W. A. Netherland, W. G. Faulkner, C. W. Vandermark, Henry and Isaac Poindexter, Elias Jackson and Charles Duane, Jr., being part of the land which the late A. A. Gates died seized and possessed, known as "Walnut Shade", and containing two hundred and ninety eight (298) acres, be the same more or less, and that said deeds and mortgages were duly recorded in the Louisa county, Virginia, Clerk's office.

This defendant admits that he knew that the complainant had been adjudged a person of unsound mind, on the 22nd day of February, 1902, and by reason thereof was confined in the hospital for the insane at Norfolk, Nebraska, for about seven months, and that during the month of September, 1902, he was discharged therefrom; that on the 24th day of March, 1908, the complainant and his wife executed a mortgage conveying the aforesaid 240 acres in Knox County, Nebraska, to F. H. Crahan, who was then cashier of the Citizens State Bank of Bloomfield, Nebraska, and now Vice president thereof, to secure the payment of a promissory note for \$3,345.89; that on the 10th day of March, 1908, the complainant and his wife conveyed said 240 acres situated in Knox County, Nebraska, by deed to the defendant, and that said deed has been duly recorded in the County Clerk's office of said Knox County, Nebraska, and that for the year 1908, this defendant is to receive \$600.00, as the rental thereof; that on the 19th day of March, 1909, Mary C. Gilmore, and W. J. Gilmore executed a deed to the complainant, conveying to him the said real estate situated in Louisa County, Virginia, and that said deed recites the consideration as \$12,750.00, and that on said day the complainant and his wife executed a deed of trust, conveying said real estate situated in Louisa County, Virginia, to Mary C. Gilmore, to secure a balance for four thousand dollars (\$4,000.00) of even date therewith, and bearing interest at the rate of 5% per annum, and that both of said instruments have been duly recorded in said Louisa county Clerk's office.

That the said \$2,000.00 in bonds hereafter referred to as a part of the consideration paid by the defendant Mary C. Gilmore, had been assigned to one Jason C. Ayres, and the said bond, the interest thereon and other indebtedness of the said Mary C. Gilmore to Jason C. Ayres amounted to the sum of \$4,000.00 or more and that on the 24th day of April, 1908, the said Mary C. Gilmore and W. J. Gilmore, by deed conveyed, assigned and transferred to said Jason C. Ayres all their right and title under the said trust deed for \$4,000.00 which assignment has been duly recorded in said Louisa County Clerk's office.

This defendant admits that complainant did much of his business with the Citizens State Bank of Bloomfield, Nebraska, of which defendant was president, and in which he was largely interested. This defendant admits that the complainant and his family, on or

about the 1st day of April, 1908, moved from Knox County, Nebraska, to the State of Virginia, taking with him some of his effects.

II.

The defendant, further answering said bill of complaint, denies that the complainant's education was meagre and mainly derived from hard experience, and alleges the fact to be, that he was well educated in the German language, moderately well educated in the English language and capable of conducting all ordinary business transactions having accumulated whatever of wealth he had in the ordinary conduct of a farm and by shrewd business methods therein, and that he trusted no one, and in making his various contracts and agreements in the conduct of his business made his own computations, his own investigations and exercised and relied upon his own judgment, and relied upon that of no other person, unless it was a member of his own household.

That defendant denies that on the 25th day of February, 1908, the complainant had the sum of \$8,400.00, in cash furnished by himself to pay the purchase price of the real estate situated in Knox County, Nebraska, and this defendant denies that said real estate either at the time of the purchase by the complainant or at any time during his ownership thereof, was free from incumbrance, but [allego] and [state] the facts to be that during said time it was always encumbered in excess of the sum of \$8,845.69.

This defendant denies that in March, 1908, or at any other time prior thereto or since, said real estate was worth \$70.00 per acre, but alleges and states the fact to be, that in March, 1908, and at the time complainant and his wife executed their deed to this defendant therefor, that the fair value of said land was not to exceed the sum of \$55.00, per acre, and the value of said entire farm was not to exceed the sum of \$18,200.00.

This defendant denies that the complainant had placed in him the utmost confidence or that he had advised with him, or that defendant had given or the complainant had taken and followed this defendant's advice in either business or other matters, or that he had intrusted this defendant with his transactions in a business way, and expressly denies that he had anything to do with making the contract or purchase of said Knox County real estate.

This defendant denies that he was better versed and acquainted either individually through his connections with said bank or in any other manner with complainant's business affairs than complainant, but alleges and states the fact to be that he knew nothing of complainant's business affairs, excepting such matters as came to him, as the officer of said bank in the proper conduct of its business.

The defendant denies that he in any way attempted to gain the confidence of the complainant or that he had gained his confidence, or that he attempted to occupy the position of self-constituted trustee or that he in any way assumed to advise or direct in any way, in any thing, at any time, any action on the part of the complainant, or

that he attempted to influence the complainant in any business transaction, or that he in any way abused or mistreated the said complainant, or in any way intentionally or unintentionally either robbed, cheated, wronged or defrauded the complainant out of his estate or any part thereof, or in any way took advantage of him, or that it was necessary for this defendant, in order to liquidate the money due him from the said Mary C. Gilmore to secure a purchaser for said Virginia real estate in excess of its real valuation, or that he in any way by fraud or in any improper manner took advantage of complainant in the contract, in the exchange of said land, or in carrying [our] of said contract and execution thereof, but alleges and states the fact to be, that in all matters with reference thereto he was open, fair, straightforward and honest.

This defendant denies that he in any way confederated or conspired with Mary C. Gilmore and W. J. Gilmore or with either of them to perpetrate upon the complainant by the use of fraud, misrepresentations, undue influence, coercion and deceit or with a combination with all or by any other means or methods or by any method his ruin, or to cheat, defraud or wrong him in any way, or that this defendant by any or all or any combination of said methods did cheat or defraud or in any way wrong said complainant.

This defendant denies that he approached the complainant with reference to making a trade between complainant and the said Mary C. Gilmore of the properties described in the said bill of complaint.

This defendant denies that he ever made a specific allegation or representation that there were three hundred acres of the Virginia land, but states the fact to be that since he has known of said tract, it has been known as a three hundred acre tract and in speaking to the complainant he did so describe it, and that on the 19th day of March, 1908, and prior thereto, the complainant was informed, and knew that the descriptions in deeds conveying said premises were that it contained two hundred and ninety-eight acres more or less, and that knowing this fact he still concluded and carried out said contract on his own initiative and without any duress, fraud or influence of this answering defendant.

That at the time the said complainant learned of said deficiency of two acres and called this defendant's attention to it, the defendant gave to the said complainant the following chattels then on said real estate to-wit: one scolloped cutaway disc, nearly new, one smoothing harrow, nearly new, one wagon and hay rack, one cultivator, one grindstone, and a lot of small tools of the value of about \$80.00 and which were accepted by said complainant in lieu of any deficiency aforesaid.

The defendant denies that he made any of the representations contained and set forth in the complainant's bill of complaint, in the paragraphs numbered second to twenty-first, both inclusive, and found on pages nine to fourteen, both inclusive, of plaintiff's bill of complaint, and denies that the facts are as set forth in said paragraphs numbered second to twenty-first, both inclusive, and denies each and every allegation of fact in said paragraphs contained, and denies that said complainant relied upon any

statement made by or information received from this defendant, or that he relied upon or trusted in them, and this defendant alleges and states the fact to be that prior to the execution of said contract and [maing] of the deeds necessary to carry the same into effect, said complainant inquired of others who knew of the coditions in Virginia and was informed that conditions in said state were entirely different from those in Nebraska, and that if complainant went to Virginia, [exception] to farm as he farmed in Nebraska, he would be severely disappointed; that in Virginia they lived differently, did differently and farmed differently; and this defendant further alleges that said Virginia land is of a good average quality, and if fertilized and farmed as good farmers in that community farm and fertilize their land, will be and is good productive land upon which good paying crops can be raised and produced.

This defendant denies that he is acquainted with and well knows the said real estate in Louisa County, Virginia, or that he so represented to the complainant, and states the fact to be that he was never on said land but once, and then stopped there but a day and a half and was never in the timber land, and made but a slight examination of the remainder thereof.

That this defendant denies that the complainant was averse to making the exchange of properties and was averse to moving to the State of Virginia, and states the fact to be, that the complainant sent for this defendant repeatedly in order to have him the defendant, come to see the complainant, for the purpose of arriving at an agreement and contract for the exchange of said realty, and this defendant denies that he in any way, either by himself or through his henchmen or by any other person or in any other manner, in the night time, or any time, did harass or disturb the complainant and his family or any member thereof, by breaking into his barns and stables, by stealing or attempting to steal his horses or cattle, or by shooting or in any other way or in any manner by any person, nor did this defendant attempt to harass, distract or influence said complainant, and that this defendant denies that any body did harass or distract the said complainant. And further this defendant alleges that the complainant voluntarily of his own free will and without duress, acting upon his own judgment and after having secured advice from persons, strangers to the transaction, executed the deeds and conveyances necessary to carry out said contract of sale, and after he had moved upon the said land in Virginia, expressed himself as pleased and satisfied.

This defendant denies that complainant and his wife executed the mortgage given to secure the \$5000.00 in the year 1908 and alleges and states the fact to be, that said [mortgagor] was executed in the year 1905, and was to mature in 1910.

The defendant answering, says that he denies that said agreement was made to provide for the execution of the deed conveying the said real estate situated in Nebraska, by March 20th, 1908, in order that the complainant might not be able to make the trip to Virginia to examine said Virginia real estate, but this defendant alleges and states the fact to be, that said Complainant was very desirous and

anxious to close up his business matters in Nebraska and move to Virginia, for the purpose of going into possession of said real estate and farming the same during the season of 1908.

This defendant denies that the complainant was to assume the payment of the two mortgages on the Nebraska real estate, aggregating \$3,345.69, but alleges and states the fact to be, that on the 12th day of March, 1908, at the time of the execution of said contract of exchange, both this defendant and the complainant were under the impression and belief that the said second mortgage was given to secure but the sum of \$2,500.00, when in truth and in fact said mortgage was given to secure \$3,345.69; that when upon the 19th day of March, 1908, the complainant and this defendant met for the purpose of executing the deeds and conveyances to be executed by said complainant, it was discovered that fixing the value of the Virginia land at \$12,750.00, as had been agreed by said parties, and deducting the sum of \$400.00, secured by the trust deed thereon, there remained of said consideration the sum of \$8,750.00; and that fixing the value of the Nebraska real estate at \$16,800.00, the amount agreed upon, and deducting the \$5000.00, which this defendant in the deed assumed and agreed to pay, there remained of said consideration the sum of \$11,800.00, and in order to correct the mistake of said parties when making said contract, this defendant paid to the complainant the sum of \$3050.00, which deducted from the \$11,800.00, makes the [remained] of the consideration for the Nebraska land the sum of \$8,750.00, and that the complainant thereupon took the \$3050.00, so paid to him by this defendant and paid to the Citizens State Bank his debt thereto, which then amounted to about the sum of \$2,690.75, secured by said second mortgage for the expressed sum of \$3,345.69.

This defendant denies that the complainant paid the sum of \$345.00, or any other sum to F. H. Graham or the Citizens State Bank or to any person for them or either of them, in payment of the debt secured by said second mortgage, except as hereinbefore set forth.

This defendant denies that the complainant ever paid to this defendant or any other person, the sum of \$5,000.00, to take up and pay off the indebtedness secured by the first mortgage on said real estate situated in Knox County, Nebraska, and alleges and states the fact to be, that this defendant in pursuance of the contract providing for the exchange of said lands, [assumed] the payment of said indebtedness of \$5,000.00, and when the same shall have matured in 1910, will pay off said indebtedness, and so contracted and agreed in accepting the deed from complainant, made on the 19th day of March, and the reason that there was no mention made in said deed of the assumption of said \$2,500.00, mentioned in said contract was because of the mistake as hereinbefore set forth and the payment by this defendant to the complainant of the said sum of \$3,050.00.

This defendant denies that either as agent of Marcy C. Gilmore and W. J. Gilmore, or as the agent of either of them, or acting for himself or acting individually or collectively with [and] person or in any manner, he cheated, defrauded, robbed, or divested the complainant of his estate or advised him to make sale of his effects by

public auction or in any other manner, or advised him to go to his Virginia home without delay.

This defendant further denies each and every allegation in said bill of complaint as to the confidence reposed in this defendant by the complainant as to the ignorance and unsuspicious nature of the complainant, as to the ignorance of the complainant of the circumstances and facts connected with the entering into the contract of exchange and the carrying out and [consumption] thereof; and every allegation in said bill of complaint which alleges or infers that this defendant in any way, in any manner or in any capacity swindled, cheated, robbed, defrauded or wronged the complainant, or persuaded or influenced him to leave Nebraska or [to] to Virginia.

This defendant denies that the complainant, by virtue of the public action of his [effect], suffered a great loss, and denies that his [effect] were sold at twenty-five [cent] beneath their real value, and alleges and states the fact to be, that said property sold at its full value and some of it at much more than its full value.

That this defendant has no knowledge as to the freight bills and expense of complainant moving to Virginia, or of the amount expended in improvements, machinery and labor, and therefore denies each and every allegation in said bill of complaint, and states the fact to be, that if complainant has expended his money with ordinary prudence it will be no loss to him, but will insure reasonable and ordinary returns if said lands so exchanged are properly and intelligently farmed.

This defendant denies that the complainant is in want, or is ruined, or has lost money by reason of any improper or wrongful [of] imprudent act of this defendant.

III.

This defendant, for further answer to the bill of complaint of said plaintiff, alleges that all the [names] mentioned in the bill of complaint he has been a resident of the city of Bloomfield, in the County of Knox, and State of Nebraska, engaged in the banking business, but that for the past six years, by reason of age and ill health he has been unable to actively engage in the control and conduct of said business, and it has been largely conducted and controlled by other officers and agents of the said Citizens State Bank, and that he had but slight knowledge of and took no particular interest in the business transactions of the complainant, either with said bank or any other person or corporation.

That on or about the 25th day of February, 1905, the complainant purchased the northeast quarter ($NE\frac{1}{4}$) of section six (6), and the north half of the northwest quarter ($N\frac{1}{2} NW\frac{1}{4}$) of section eight (8), all in township twenty-nine (29), north, range three (3) west of the sixth Principal Meridian, in Knox County, Nebraska, being a portion of the land in controversy in this action and in order to pay for the same, borrowed from this defendant and the Citizens State Bank the sum of \$8,871.54. Five thousand dollars (\$5,000.00) thereof was borrowed from this defendant, and secured by a first

mortgage on said real estate, being the mortgage referred to in complainant's bill of complaint, as executed on the 24th day of February, 1908, and alleged copy of which is marked Exhibit "I" thereof, and the said sum of \$3,345.69, was borrowed from the Citizens State Bank and secured by a second mortgage on said land to F. H. Graham; that the balance of said indebtedness due from complainant to said bank, to-wit: the sum of \$625.85 was secured by a chattel mortgage on the complainant's personal property.

That at said time said land was worth about \$35.00 per acre; that on March 12th, 1908, said lands had increased in value until they were worth from \$50.00 to \$55.00 per acre, but no more; that said defendant, at all times mentioned in complainant's bill of complaint, had but slight knowledge of land in the State of Virginia, and its productiveness and fertility, and of the particular tract described in complainant's bill of complaint and called "Walnut Shade" having been on said premises but one and a half days on a visit, and that what information and knowledge he had was obtained from other persons, excepting only what he saw while stepping in the dwelling house thereon while so visiting, and in a short walk across a portion of the cultivated land, and that this defendant so informed him, the complainant, prior to the signing of the contract on the 12th day of March, 1908.

That during the year 1907, the complainant came to the defendant in the city of Bloomfield, and inquired as to whether or not the defendant could procure him a farm or plantation in the State of Virginia, or some where south, where it would be warmer than it is in Knox County, or the northern part of Nebraska, and requested him that if he, the defendant, could, he would like to have him procure such farm or plantation for the complainant.

That the defendant Mary C. Gilmore was the owner of the tract of land described in the bill of complaint and called "Walnut Shade," and located in Lodiia County, State of Virginia, that she and her husband were both old, being near 70 years of age, and without any help to farm and manage said real estate, except by renting the same. That said real estate is in that portion of Virginia which has been farmed for a long time, and in order to be farmed profitably is sited and assisted by the use of fertilizers; and that when farmed as is advised and directed by the better class of farmers and by those interested in the agricultural development of said state is profitable.

That the said Mary C. Gilmore was desirous of disposing of said property and removing to some place where she would be nearer her children and so avoid the burden of overseeing said plantation, and had requested the defendant to sell or exchange the same with that end in view, and to use his best judgment and best endeavors to secure her adequate and full compensation for said [premises]. That said premises were on the 12th day of March, 1908, of the value of at least \$35.00 per acre. That prior to the signing of said contract on the 12th day of March, 1908, this defendant informed the complainant that he was representing the said Mary C. Gilmore, in making said exchange, and was looking after her interests; that during the year immediately [preceding] the 12th day of March, 1908, the complain-

ant on several occasions tried to make a trade or exchange, for said Virginia plantation, and repeatedly brought up the subject with that end in view, and that as this defendant now remembers, there was no occasion upon which this defendant took the initiative; that at the time of the making of said contract and the fixing of said price per acre for the purpose of said exchange, neither party made representations as to value, other than that imparted by the fixing of the price he asked for the land offered in the exchange or trade, and that the price of \$70.00 per acre asked by the complainant for his land was at least \$15.00 per acre in excess of its actual value.

That without any misrepresentation, fraud, collusion, conspiracy, undue influence, duress, or any deceit, art, or device on the part of this defendant, or those charged with him, or any other person; but after a full, fair, and complete disclosure to the complainant of all things known by this defendant with reference to the said real estate, so far as inquired of, and with no attempt to prevent the fullest investigations, and after inquiries made of disinterested persons, strangers to this action, the contract set forth in plaintiff's bill of complaint, was duly and regularly executed by the complainant and this defendant, the said defendant acting for the said Mary C. Gilmore.

That by the terms of said contract and agreement it was intended that this defendant and the said Mary C. Gilmore should assume the mortgage upon the said Knox County land to the amount of \$7,500.00, which was by said parties then believed to be the actual amount of said incumbrance.

That the said complainant was extremely anxious to close said deal, sell his effects and proceed to Virginia, to occupy said premises in Louisa County, at as early a date as possible, although this defendant did advise against such procedure because the season had so far advanced; but that said advice and suggestions were disregarded by the complainant.

That thereupon on the 19th day of March, 1908, all of the papers necessary to carry out said contract were prepared. Those to be executed by the complainant were by him executed and delivered, and those to be executed by the said Mary C. Gilmore and W. J. Gilmore were sent to them in Virginia, and by them executed, and in accordance with the agreement with the complainant, by them retained until his, the complainant's arrival in Virginia, at which time they were delivered to the complainant and by him received, and after an examination of the property, and having declared himself fully satisfied, the complainant accepted said deeds and recorded them in the Clerk's office in Louisa County, Virginia.

That on said 19th day of March, 1908, at the time of carrying out of said contract by the examination of said deeds, it was discovered that said second mortgage covering complainant's land in Nebraska, was for the sum of \$3,345.69, the exact indebtedness being to both parties unknown, and thereupon this defendant instead of assuming said second mortgage, to the amount of \$2,500.00, paid to said complainant the sum of \$3,050.00, that being the difference between the tracts of land at the agreed prices, the

Knox County land being charged with the \$5,000.00 mortgage, and the Louisa County land being charged with the \$4,000.00. That at said time and place, and before the execution of said instruments the complainant called attention to the fact that there was but two hundred and ninety eight acres in the Louisa County Virginia, tract of land, and that prior to the execution of said instruments and deeds of conveyance, this defendant, then being the owner thereof of one scollop cutaway disc, nearly new, one smoothing [*smoothing*] harrow, nearly new, one wagon and hay rack, one cultivator, one [*garden*] cultivator, one grindstone, garden tools, and other farm tools of the value of about \$80.00, and then located on said farm in Virginia, or near thereto, turned over and transferred to the complainant the said chattels above described, to make up and take the place of said deficiency of two acres of land.

That as to whether or not said tract of land contained two hundred and [*ninty*]-eight acres or three hundred acres this defendant has no authentic information, but this defendant is informed and believes, and on such information and belief, alleges that said tract of land contains full three hundred acres.

That in the execution of said instruments, deeds and conveyances, the delivery thereof, and in all acts and deeds done or performed in the carrying into execution and fulfillment of said contract of trade or exchange this defendant acted in the utmost good faith toward the complainant, and that without any misrepresentation, fraud, collusion, conspiracy, undue influence, duress or any deceit, art, or device on the part of this defendant, or those charged with him or any other person, but after a full, fair and complete disclosure to the complainant of all things known by this defendant with reference to said real estate, so far as inquired of, and with no attempt to prevent the fullest investigation, and after [*inquiries*] made by the complainant of disinterested persons, strangers to this action, the aforesaid deeds and conveyances were duly executed, delivered, accepted and received by the respective parties, and by them recorded.

That upon the arrival in the State of Virginia, and after an examination had been made of said premises by the complainant the said complainant represented to the said Mary C. Gilmore and W. J. Gilmore, that this defendant had contracted for, bargained and agreed to and with the complainant for the transfer and delivery to the complainant of one cow, certain turkeys and chickens and a portion of the household furniture of the said Gilmore, that although protesting that they did not so understand the contract, they acceded to the demands of said complainant and delivered to him said chattels, which the complainant received and still retains.

The defendant further states that the said Virginia farm is worth at a fair valuation the sum of \$35.00 per acre; that the said farm has about one hundred and [*wixty*] acres of land that could be cultivated now, and about one hundred acres of old timber land that has never been cleared off, and about forty acres that has grown up to young timber and brush since they ceased to cultivate said

land some five or six years ago; that by proper farming and fertilizing the said land will produce from twenty to fifty bushels of corn to the acre, from twelve to twenty-three bushels of wheat to the acre and from ten to twenty bushels of oats to the acre; that the wheat, oats and all kinds of small grain must be sown in the fall of the year to produce good returns.

This defendant further states that there is on said farm or plantation in Virginia about one hundred and fifty acres of gray clay soil, and about fifty acres of red clay soil, that the defendant does not know the character of the soil in the timber; that where the said land is well farmed and fertilized it will produce from one and a half to three tons of hay to the acre; that there is on said plantation an orchard comprising about seven acres and having standing and growing thereon between four and five hundred fruit trees; that there is situated on said plantation a large bank barn with stone basement and two grain and hay mows and one overhead [now], the size of which this defendant does not know, and four stables and two feeding alleys; that [the] is situated on said farm or plantation a large dwelling house having thirteen rooms, built partly of brick and partly of hard pine, finished inside with hard pine in natural colors, all of which the said defendant informed the said complainant at the time and prior to the signing and delivery of deeds for said lands.

IV.

That the said complainant prior to the filing of his complaint and prior to the 20th day of July, A. D. 1908, was fully informed and aware of all facts or alleged facts set forth in his bill of complaint and was fully informed as to the truth or falsity of each and every of the alleged misrepresentations set forth in his bill of complaint; that in the month of July, 1908 and prior to the transactions hereinafter set forth and after the complainant was so fully informed as to the truth or falsity of all of the alleged misrepresentations complained of in said bill of complaint the said complainant came from Virginia to the State of Nebraska and was in Knox County in said State of Nebraska and within easy access to and of easy communication with this defendant that he neither made nor attempted to make or give notice of any intention to make or ask for a rescission or cancellation of said contract or of any complaint made or to be made with reference to said exchange of lands, and that the first notice that this defendant received of the intention of the complainant to ask for a rescission or cancellation of said contract was when he received notice by service of the process issued out of this court of the commencement of this proceeding against him and his co-defendants; that after the 20th day of July to-wit: On or about the — day of July this defendant paid to the said Mary C. Gilmore his co-defendant the sum of — Dollars in settlement of the purchase price paid by him to her for said reality; that since said date and before this defendant had any knowledge of this action or of the complainant's intention to institute the same and before the defend-

ant had any knowledge that said exchange was not satisfactory, said Mary C. Gilmore had invested said money in real property which she now occupies as her homestead and in other exempt property and that to the sum of \$2,500.00 the same is exempt as her homestead and personal exemptions under the laws of the state of Nebraska, and that this defendant has no way in which to recover the same, that if the complainant had advised this defendant of his intention to bring suit to secure rescission of said contract of exchange, this defendant could have taken such action as would have protected himself against said loss and that, if the prayer of the complainant's bill should be permitted that this defendant as to the said sum so paid to the said Mary C. Gilmore, is wholly without [reverdy] and for said [reason] the complainant should not be permitted to prosecute the said action.

V.

That the complainant remaining in possession of said real estate until in February 1909, during the months of September, October and November 1908 and after complainant had knowledge of all of the conditions and facts surrounding said transaction complained of in his bill of complaint and had full knowledge of the exact value, situation and surroundings of the real estate in Virginia, involved in said action, and after he had full knowledge of the truth or falsity of each and all of the alleged misrepresentations set forth in his bill of complaint and after he had filed his bill of complaint in this action, and while in full control of said real estate, the complainant, his agents and servants at his request cut off very great amount of valuable timber of different kinds the exact amount of which this defendant is unable by want of definite information to state, but which, when he shall have definite information he prays leave of this court to set forth with great particularity charged in proper words, but on information and belief alleges that there are more than 1,400 logs which were formerly and at the time of said trade and at the time of the filing of the complainant's bill of complaint, standing timber upon said farm in Louisa County, Virginia, of the reasonable value of \$1,400.00 or more, which said complainant, his agents and servants have utterly destroyed and which is not now a part of said property and that by so doing said complainant has greatly damaged said realty and has greatly depreciated its value, and has thereby affirmed and approved said exchange and has waived his right to rescind or cancel said contract and to permit him to cancel or rescind or cancel said contract and to permit him to cancel or rescind said contract would be a great injustice upon this defendant and his co-defendant, that this defendant did not know or learn of said action by the complainant until about the middle of the month of February, 1909.

VI.

That during the year 1909, and after the complainant had full knowledge of all the conditions, circumstances and facts surround-

ing said transaction complained of in his bill of complaint and full knowledge of the exact value, situation and surroundings of the real estate involved in this action, and after he [—] full knowledge of the truth or falsity of each and all of the alleged misrepresentations set forth in the bill of complaint, and after this action was commenced the complainant permitted the trust deed, which he and his wife had given to secure the said sum of \$4,000.00 and which deed conveyed the real estate in Louisa County, Virginia, known as "Walnut Shade," to be foreclosed and the said real estate to be sold and conveyed to Jason Ayers the owner of the said trust deed and indebtedness; and so the complainant has placed it beyond his power to restore to the defendants the position they were in before the said contract was made and entered into.

VII.

That the master has recommended a decree in this action for [—] certain sum of money and nothing else. That this defendant [object] to the jurisdiction of this court to try the issue upon which the said master makes his finding of fact or to enter judgment thereon and alleges that such issue is only *trial* in a court of law.

That in answer to the request for a disclosure, as to the financial relations between this defendant and his co-defendants, this defendant alleges that the defendant W. J. Gilmore, never was at any time indebted to this defendant, that the defendant Mary C. Gilmore was indebted to him on a note dated February 15th, 1905, in the sum of \$1,476.60, a note for \$30.00, dated June 28th, 1905, a note for \$55.00 dated November 1, 1906, a note for \$60.00 dated March 13th, 1907, and the sum of \$30.00 due this defendant's wife and secured April 6th, 1906; that this defendant after said Gilmore had moved to the [Stage] of Nebraska, on the — day of —, 1908, purchased of the said Mary C. Gilmore, the said two hundred and [so-ty] acres of land in Knox County, Nebraska for \$52.50 per acre, all of which he has paid.

This defendant denies each and every allegation in said bill of complaint not hereinbefore admitted, or otherwise answered.

Wherefore this defendant having fully answered, confessed traversed, and avoided or denied all matters in said bill of complaint material to be answered according to his best knowledge and belief, humbly prays this honorable court, to enter its decree that this defendant be [hence] dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this honorable Court may seem meet and in accordance with equity.

W. D. FUNK AND
R. E. EVANS,
Solicitors for Defendant.

W. D. FUNK AND
R. E. EVANS.

STATE OF NEBRASKA,
Knox County, ss:

Edward Renard of lawful age, being first duly sworn on oath deposes and says: that he is the defendant named in the above entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the facts stated are true as he verily believes.

EDWARD RENARD.

Subscribed in my presence and sworn to before me this 21 day of December, A. D. 1912.

[SEAL.]

H. F. FRIEDERICHES,
Notary Public.

Copy.

Robert E. Evans, Attorney and Solicitor, Dakota City, Nebraska.

OCT. 19, 1915.

R. C. Hoyt, Clerk of U. S. Dist. Court, Norfolk Division, Norfolk, Nebr.

DEAR SIR: Please make me a copy of the amended and substituted answers of the defendant Edward Renard and of the defendant Mary C. Gilmore with the replications thereto filed in the case of John H. Friederichsen vs. Edward Renard et al. The answers I think were filed in December, 1912 and the replications soon thereafter. Certify to the same and mail to me with [with] for making the same or if you desire send me a statement of the fees for making and certifying to the same and I will remit. Please put the matter in form for filing in the Circuit Court of Appeals as a part of the record already there.

Yours truly,

R. E. EVANS,
By L. H.

R. E. E/L. H.

Filed Oct. 23, 1915. R. C. Hoyt, Clerk, by O. F. Granel, Deputy.

Copy.

Robert E. Evans, Attorney and Solicitor, Dakota City, Nebraska.

OCT. 22, 1915.

Mrs O. F. Granel, Deputy Clerk of U. S. Dist. Court, Norfolk, Nebr.

MADAM: In reference to the case of Friederichsen vs. Renard et al. and replying to yours of the 20th inst., in April, 1909 an amendment was filed to the answers of Edward Renard and Mary C. Gilmore. In July, 1911, a second [amendment] was filed to the answers of both of the defendants as stated in your letter. Also on Dec. 12th, I think,

1912, a motion was filed for leave to file amended and substituted answers and the same were filed on that day. I have office copies of the same, so has Senator Allen and these amended and substituted answers were in the files at the time the case was submitted to Judge T. C. Munger of Norfolk on the stipulation. They may have been taken by mistake by Senator Allen. I have looked over my files and I do not have the originals. I have my office copies. If you wish the same I could forward them to you. I am.

Very respectfully yours,

R. E. EVANS.

R. E. E./L. H.

Filed Oct. 23, 1915. R. C. Hoyt, Clerk. By O. F. Grauel, Deputy.

Copy.

Robert E. Evans, Attorney and Solicitor, Dakota City, Nebraska.

Nov. 15, 1915.

Miss O. F. Grauel, Deputy U. S. District Clerk, Norfolk, Nebr.

MADAM: Some time since I sent you an order for a transcript of the amended and supplemental answer of Edward Renard and the amended and supplemental answer of Mary C. Gilmore with the replications thereto in the case of John H. Friederichsen vs. Renard et al. It developed that there were no replications to those amended and supplemental answers. However, you sent me two amendments to the original answer of Edward Renard and two amendments to the original answer of Mary C. Gilmore with the amended and supplemental answers requested. As the record we are getting is to be printed we do not wish to print anything unnecessary to the proper presentation of our case. Because of the conditions above mentioned, that is, the fact that there were no replications on file and the order that the replications to the original answer should stand as the replications to the amended answer not being on [filed], an agreement with Senator Allen and myself was necessary and such agreement had to be covered by a stipulation. We have therefore agreed by stipulation to simply print the amended and supplemental answer of Edward Renard which we have selected from that portion of the record which you made and return to you. We endeavored to use the certificate which you made to the original papers but the clerk of the Circuit Court of Appeals desires the certificate to cover simply the paper inclosed hence I [am] returning the same to you in order that you may make a certificate as to the amended and supplemental answer of Edward Renard. I am also returning that portion of the transcript which covers the amendments to the answers and which we did not ask for. Please make the certificate and send me your statement for fees. If you still think that the charge should be for the amendments of course we will pay it but as they were not ordered at any time it would seem to me they should not be a charge.

to us. The amended and supplemental answer of Mary C. Gilmore of course should be charged for although we do not intend to use it. If communication with me is necessary before the return of the amended and supplemental answer of Edward Renard please phone me at my expense. I am also inclosing the copies of letters to you which were formerly attached to the transcript sent by you.

Yours respectfully,

R. E. EVANS.

R. E. E./L. H.

Filed Nov. 18, 1915. R. C. Hoyt, Clerk. By O. F. Grauel,
Deputy.

(Clerk's Certificate to Additional Transcript of Record.)

UNITED STATES OF AMERICA,
District of Nebraska, Norfolk Division, vs:

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, do hereby certify that pursuant to letters from R. E. Evans, one of the attorneys for defendant, dated October 19th, October 22nd and November 15th, 1915 respectively, the foregoing record has been made, and that the same is a true and faithful transcript of the amended and substituted answer of the defendant, Edward Renard, as the same appears of record and on file in my office in the Norfolk Division of said Court, in the case of John H. Friederichsen, Complainant, vs. Edward Renard, et al., Respondents, No. 26 Docket "A".

Witness, my hand and the seal of said Court, at Norfolk, in said District, this 18th day of November, A. D. 1915.

[Seal U. S. Dist. Court, Dist. of Nebr., Norfolk Division.]

R. C. HOYT, Clerk,
By O. F. GRAUEL, Deputy.

Documentary Stamp Cancelled Nov. 18, 1915.

Filed Nov. 18, 1915. Per Stipulation. John D. Jordan, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4478.

JOHN H. FRIEDERICKS, Plaintiff in Error,

v.

EDWARD RENARD, in His Own Right, etc.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

WILLIAM V. ALLEN,
Madison, Nebraska.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 18, 1915.

(Appearance of Counsel for Defendants in Error.)

The Clerk will enter my appearance as Counsel for G. H. Renard, as Executor, and Charles Cook and Herman F. Friedericks, Administrators with the Will annexed, as substituted Defendants in Error in the place of Edward Renard, deceased.

R. E. EVANS,
W. D. FUNK.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 2, 1915.

(Suggestion of Death of Defendant in Error and Substitution of Legal Representatives and Order of Revivor.)

And on the twenty-ninth day of June, 1915, a suggestion of death of Edward Renard, defendant in error, was filed in said Circuit Court of Appeals, which together with the Voluntary Appearance of the Legal Representatives and the Order of Revivor entered by said Circuit Court of Appeals fully appear at pages 116 to 118, inclusive, of the printed record herein.

(*Order of Argument.*)

December Term, 1915.

WEDNESDAY, December 15, 1915.

No. 4476.

JOHN H. FRIEDERICHSEN, Plaintiff in Error,

vs.

G. H. RENARD, Executor, etc., et al.

In Error to the District Court of the United States for the District of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William V. Allen for plaintiff in error, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission.*)

December Term, 1915.

THURSDAY, December 16, 1915.

This cause having been called for further hearing, argument was continued by Mr. R. E. Evans for defendants in error and concluded by Mr. William V. Allen for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1915.

No. 4476.

JOHN H. FRIEDERICHSEN, Plaintiff in Error,

vs.

G. H. RENARD, as Executor of the Estate of Edward Renard, Decedent, et al., Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska.

Mr. William V. Allen (Mr. William L. Dowling was with him on the brief), for plaintiff in error.

Mr. R. E. Evans (Mr. W. D. Funk was with him on the brief), for defendants in error.

Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

CARLAND, *Circuit Judge*, delivered the opinion of the Court:

Friederichsen, hereafter called plaintiff, on September 22, 1908, filed a bill in the United States Circuit Court for the District of Nebraska, against Edward Renard in his own right and as agent of Mary C. Gilmore, Mary C. Gilmore and W. J. Gilmore, hereafter called defendants, for the purpose of having a contract between the plaintiff and Renard, dated March 12, 1908, and a deed executed in pursuance thereof by plaintiff to Renard on March 19, 1908, conveying two hundred and forty acres of land in Knox County, Nebraska, declared null and void, and for damages for the reason that the plaintiff had been induced by false and fraudulent representations on the part of Renard to enter into the contract and to execute the deed. Renard and Mary C. Gilmore answered the bill. A special master was appointed, to take the evidence, find the facts, and report the same to the court with conclusions of law. The master heard the evidence and made his report. It appeared from the report that a part of the consideration for the Knox County land conveyed by the plaintiff to Renard was land in Louisa County, Virginia; that the plaintiff went into the possession of this land and cut down a large amount of timber, and that the sum of \$8,050.00 paid by Renard to plaintiff in connection with the exchange of lands had not been refunded or offered to be returned to Renard by the plaintiff. As a conclusion of law from these facts the master found that there could be no rescission of the contract or cancellation of the deed. The master, however, found that the plain-

tif was entitled to damages in the sum of \$5,880.00. The defendants excepted to the report of the special master and made a motion to set the same aside.

On September 23, 1913, the court (Hon. W. H. Munger, Judge), set the report aside, and claiming to act under equity Rule 22, ordered the case transferred to the law side of the court, agreeing with the master that there could be no rescission of the contract or cancellation of the deed, but that the case for damages should be conducted as an action at law. The plaintiff did not object in any way to the order of transfer and on September 25, 1913, filed what is termed in the record an amended petition at law, wherein the same facts were alleged as constituting fraud as were alleged in the bill, and a judgment for damages was asked. The defendants moved to strike the amended petition from the files for several reasons, among which was the following:

(9) "Because the causes of action set out in the amended petition is barred by the Statute of Limitations." On July 15, 1914, the court (Hon. Smith McPherson, Judge), denied the motions. The defendants then answered the so-called amended petition. Plaintiff then made a motion to strike from the answers certain alleged irrelevant and redundant matter, included in which was an allegation that the action was barred by the statute of limitations. On September 16, 1914, the court (Hon. Smith McPherson, Judge), granted the motion to strike. September 21, 1914, counsel for defendants in open court asked permission to withdraw their answers and file pleas in abatement instanter setting up those things that had been stricken from the answers. The court (Hon. Page Morris, Judge), denied the request. November 4, 1914, the case was moved for trial before Hon. T. C. Munger, Judge, and a jury. The defendants moved that no evidence be allowed to be introduced for the reason among others:

(8) "Because more than four years have elapsed since discovery of the alleged fraud and prior to the filing of the amended petition in this case." On November 6, 1914, while the case was on trial it was stipulated that the plaintiff had shown himself entitled to recovery against the defendants if the action had not been barred by the statute of limitations of Nebraska; thereupon, the court took the question as to whether the case was barred under advisement; and March 24, 1915, recalled the jury and directed a verdict in favor of defendants on the ground that the action set forth in the so-called amended petition was barred. Plaintiff excepted to the ruling of the court and sued out this writ of error to review the judgment entered. It is first urged as error that the court below in rendering final judgment did not follow the rulings of the other judges who had ruled, as claimed by counsel for plaintiff, that the action was not barred by the statute of limitations.

It may be stated, as a matter of comity and orderly judicial procedure, that where a question has been ruled by one district judge, the ruling ought to be followed by another district judge sitting in the same case, otherwise great confusion might arise if each judge called to sit in a case should set up his own independent opinion.

upon a question which had been already ruled in the same case. The ruling, however, which transferred the cause to the law side of the court did not decide any question regarding the statute of limitations and we are not informed by the record for what reasons the other judges made the rulings they did. But whatever may have been the reasons or whatever may be the correct procedure the rulings made in no way affect the power of this court to review the final judgment. We therefore pass to the only remaining question in the case, and that is, was the cause of action stated in what is called the amended petition a new cause of action or was it an amendment of an old cause of action, so as to relate back to September 22, 1908, when the bill was filed. It seems to be conceded that the cause of action stated in the so-called amended petition is a cause of action mentioned in Section 7569 of the Revised Statutes of Nebraska (Ed. 1913).

This section provides a limitation of four years for actions for relief, on the ground of fraud, and also provides that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. It is also conceded, or at least must be conceded, that if the so-called amended petition set up a new cause of action that it was barred by the statute. Plaintiff claims however that the case stated in the so-called amended petition was simply an amendment of the case stated in the original bill, and therefore, the statute of limitations did not run after the bill was filed. We think the contention of counsel for plaintiff is unsound, and that this clearly appears by an examination of the record.

The original bill was brought for the purpose of rescinding the contract between the parties and for such damages as might be recovered in an equitable action with such relief in view. The bill was answered and the action proceeded to a determination which would have resulted in the dismissal of the bill had not the court decided that the course marked out by equity rule 22 ought to be followed. It appears from the report of the master and from the memorandum of the court that the cause in equity failed because Friedericheen had not refunded nor offered to refund the money paid to him by Renard on the exchange of lands and also that Renard with knowledge of the character of the Virginia lands had cut valuable timber therefrom. In other words, Friedericheen by his own voluntary acts had rendered it impossible for him to place Renard in the same position as he was before the contract and deed were made. Now to say that an action at law wherein the plaintiff did not seek to rescind the contract but sought to affirm it and recover his damages for the fraud is an amendment to the cause of action stated in the bill seems to be clearly erroneous. The cause of action stated in the so-called amended petition was a new cause of action. There never had been stated in court such a cause of action as was stated in the so-called amended petition, and therefore, it could not be said to be an amendment to any such cause of action. It was simply a new action at law directly opposed to the theory stated in the bill. We think the case is clearly ruled by *Whalen v. Gordon*, 25 Fed. 305, a decision by this court and also by the following cases:

Union Pac. R. R. Co. v. Weyler, 158 U. S. 285-291; Robb v. Vos, 155 U. S. 13, 41-43; Stewart v. Hayden, 72 Fed. 403-411-412; First Nat. Bk. of Chadron v. McKinnney, 47 Neb. 149, 151-2; American Bldg. & Loan Ass'n v. Rainbolt, 48 Neb. 434, 440; Pollock v. Smith, 49 Neb. 864-868; First Nat. Bk. of Chadron v. Tootle, 59 Neb. 44, 46-48; Boggs v. Young, 81 Neb. 621-624-5.

We do not think this court intended in Schurmier, et al., v. The Conn. Mut. Lift Ins. Co., 171 Fed. 1, to overrule Whalen v. Gordon. In the Schurmier case it appeared that under a statute of Minnesota and by order of court creditors of a decedent estate were allowed six months within which to present their claims. Under the statute if good cause was shown for the delay, the court might receive a claim and allow it not later than eighteen months after the order. The Insurance Company being a foreign creditor began suit in the federal court upon its claim within eighteen months, but set up no reason for the delay. After the eighteen months had elapsed and after demurrer sustained to plaintiff's pleading on application the suit was transferred to the equity side of the court and a bill filed setting up facts which were held sufficient cause for the delay, and the plaintiff was allowed to recover. But in this case there was no change of the cause of action and the real question decided was whether the amendment alleging facts which excused the delay would relate back to the time of filing the original bill. In Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, it was held that where the amendment alleges a new cause of action the statute of limitations runs until the amendment is filed, and this though the amendment is made by consent.

We are clearly of the opinion, that if the cause of action stated in the petition at law can be called an amendment of the cause of action stated in the bill, which we very much doubt, still it was a new cause of action and as such barred by the statute of limitations of Nebraska.

Judgment affirmed.

Filed March 25, 1916.

(*Judgment.*)

United States Circuit Court of Appeals, Eighth Circuit, December
Term, 1915.

No. 4478.

SATURDAY, March 25, 1916.

JOHN H. FRIEDERICHSEN, Plaintiff in Error,

v.

G. H. REWARD, as Executor of the Estate of Edward Renard, Deceased; and Charles Cook and Herman F. Friedericks, as Administrators with the Will Annexed of the Estate of Edward Renard, Deceased; and Mary C. Gilmore and W. J. Gilmore.

In Error to the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that G. H. Renard, as Executor of the Estate of Edward Renard, deceased, and Charles Cook and Herman F. Friedericks, as Administrators with the will annexed of the Estate of Edward Renard, deceased; and Mary C. Gilmore and W. J. Gilmore, have and recover against John H. Friederichsen the sum of twenty dollars for their costs herein and have execution therefor.

March 25, 1916.

In the United States Circuit Court of Appeals, Eighth Circuit.

Number 4476.

JOHN H. FRIEDERICHSEN, Plaintiff in Error,

G. H. RENARD, as Executor of the Estate of Edward Renard, Deceased, et al., Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska, Norfolk Division.

Petition and Brief of Plaintiff in Error for Rehearing.

William V. Allen and William L. Dowling, Madison, Neb., Attorneys for Plaintiff in Error.

R. E. Evans, Dakota City, Neb., and W. D. Funk, Bloomfield, Neb., Attorneys for Defendants in Error.

The said plaintiff in error, John H. Friederichsen, comes now and respectfully petitions this honorable court for a rehearing of this case for the following reasons, to-wit:

1. Because the court erred in not sustaining and giving effect to each of the assignments of error numbered respectively one (1), two (2), thres (3), four (4), five (5), six (6), seven (7) and eight (8) found on pages one hundred seven (107) and one hundred eight (108) of the record, to which reference is here made.

2. Because the court erred in holding and ruling that the commencement of the case as a suit in equity constituted a conclusive election of remedies on the part of the plaintiff in error and prevented the transfer of the case from the equity to the law docket to be there treated and tried as an action at law on the plaintiff's amended petition.

3. Because the court erred in holding and ruling that the amended petition introduced a new cause of action, which was barred by the statute of limitations.

4. Because the court erred in affirming the judgment of the district court and in not reversing its judgment and remanding the case for a trial.

And your petitioner therefore prays that an order may be made for a rehearing of the argument in this case on a day to be appointed by this court at the present term, and upon such points as it may direct. And in support hereof he appends a short brief.

JOHN H. FRIEDERICHSEN,

Plaintiff in Error,

By **WILLIAM V. ALLEN,**

His Attorney.

I hereby certify that this petition for a rehearing is presented in good faith and I believe that it is based on meritorious grounds.

WILLIAM V. ALLEN,
Attorney for Plaintiff in Error,
Madison, Nebraska.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 11, 1916.

(Order Denying Petition for Rehearing.)

May Term, 1916.

FRIDAY, June 16, 1916.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

June 16, 1916.

(Motion to Withhold Mandate.)

Now comes the plaintiff in error, John H. Friederichsen, and moves the court to enter an order withholding the mandate in this case because it is the bona fide intention of the plaintiff in error to perfect a writ of error herein to the Supreme Court of the United States, or to make proper application to said court for a writ of error in this case, or do both, as he may be advised, within the next ninety days, and in support hereof the plaintiff in error attaches the professional statement of his counsel William V. Allen, of Madison, Nebraska.

WILLIAM V. ALLEN,
Attorney for Plaintiff in Error.

I hereby certify that it is the bona fide intention of the plaintiff in error, John H. Friederichsen, to remove this case to the Supreme Court of the United States by writ of error or to make an application to said court for a writ of certiorari, or do both, as he may be advised, within the next ninety days, and that I believe there is merit in his case and that the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

WILLIAM V. ALLEN,
Attorney for Plaintiff in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 22, 1916.

(Order Staying Mandate.)

May Term, 1916.

MONDAY, June 26, 1916.

Upon consideration of the motion of Counsel for Plaintiff in Error for an order staying the mandate herein, pending an application to the Supreme Court of the United States for a writ of certiorari, it is now here ordered that said motion be granted, and that the mandate in this case, be, and the same is hereby stayed until and including the 18th day of October, 1916, on the condition, however, that said petition for certiorari be submitted to the Supreme Court on the first day of the October Term, it being the 9th day of October, 1916.

June 26, 1916.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein John H. Friederichsen is Plaintiff in Error and G. H. Renard, as Executor of the Estate of Edward Renard, deceased, et al., are Defendants in Error, No. 4476, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of August, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Aug. 21, 1916, John D. Jordan.]

In the Circuit Court of Appeals of the United States, Eighth Circuit
 No. 4476.

JOHN H. FRIEDERICHSSEN, Plaintiff in Error,

vs.

G. H. RENARD, as Executor of the Estate of Edward Renard, Deceased, et al., Defendants in Error.

Stipulation.

It is hereby stipulated by and between the parties hereto that the transcript already filed in the office of the clerk of the Supreme Court of the United States in this case, with the petition for a writ of certiorari herein shall be taken as a return to this writ.

Dated October 27, A. D. 1916.

WILLIAM V. ALLEN,

Counsel for John H. Friederichsen, Plaintiff in Error.

W. D. FUNK AND

R. E. EVANS,

*Counsel for G. H. Renard, as Executor
 of the Estate of Edward Renard,
 Deceased, et al., Defendants in Error.*

Endorsed: No. 4476. In the Circuit Court of Appeals of the United States, Eighth Circuit. John H. Friederichsen, Plaintiff in Error, v. G. H. Renard, as Executor of the Estate of Edward Renard, Deceased, et al., Defendants in Error. Stipulation as to Return to Writ of Certiorari. Filed Nov. 15, 1916. John D. Jordan, Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which John H. Friederichsen is plaintiff in error, and G. H. Renard, as Executor of the Estate of Edward Renard, deceased, et al., are defendants in error, No. 4476, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in

mid cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of October, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of John H. Friederichsen, Plaintiff in Error, vs. G. H. Renard, as Executor of the Estate of Edward Renard deceased, et al., No. 4476, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

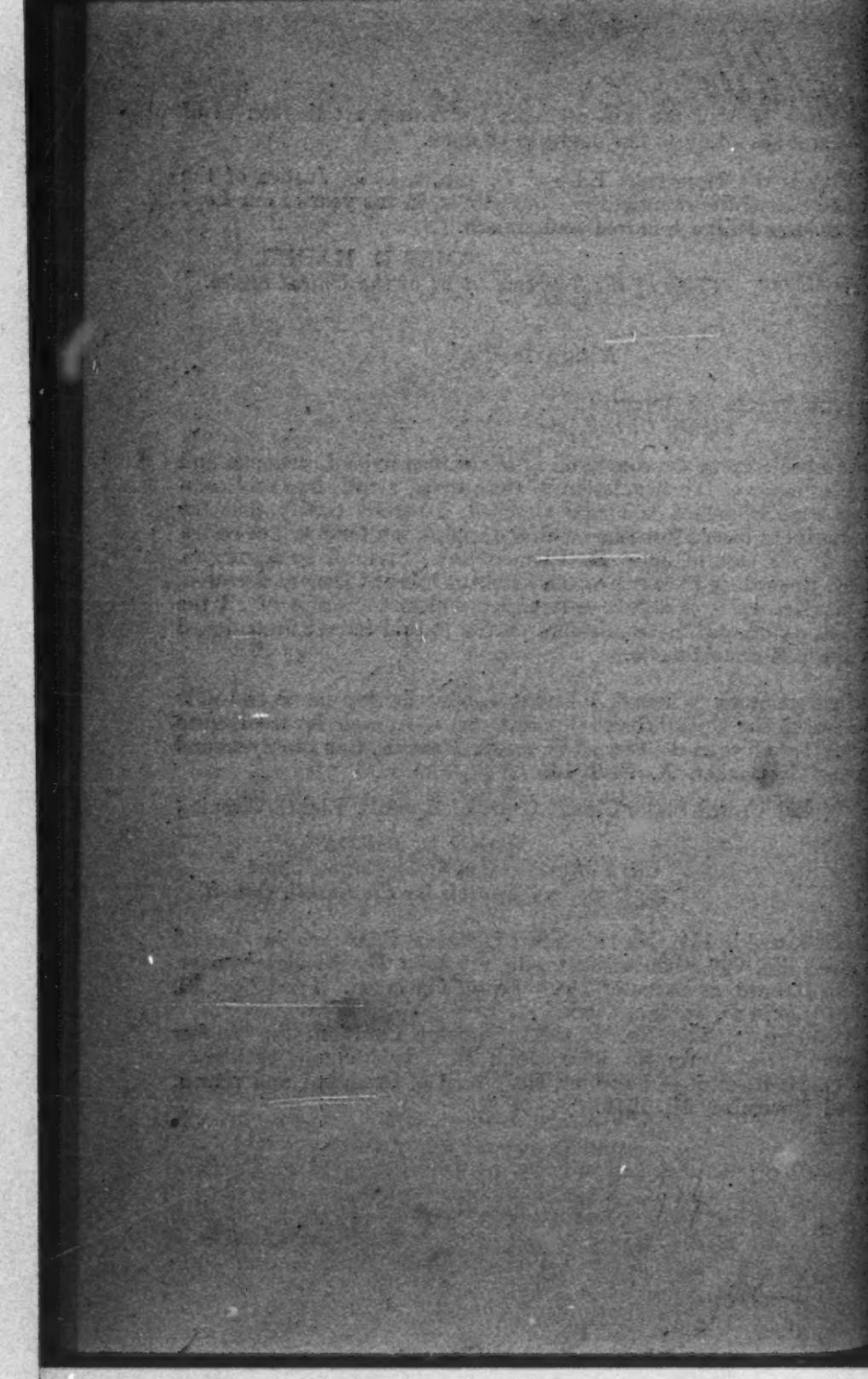
In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-second day of November, A. D. 1916.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

[Endorsed:] File No. 25,499. Supreme Court of the United States. No. 669, October Term, 1916. John H. Friederichsen vs. G. H. Renard, as Executor, etc. Writ of Certiorari. Filed Nov. 15, 1916. John D. Jordan, Clerk.

[Endorsed:] File No. 25,499. Supreme Court U. S., October Term, 1916. Term No. 669. John H. Friederichsen, Petitioner, vs. G. H. Renard, as Executor, etc. Writ of Certiorari and return. Filed November 24, 1916.



IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, A. D. 1916.

JOHN H. FRIEDERICHSEN,
PETITIONER,

VS.

G. H. RENARD, AS EXECUTOR OF THE ESTATE OF
EDWARD RENARD, DECEASED, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

WILLIAM V. ALLEN, *Counsel for Petitioner.*

Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth circuit, to require said court to certify to the Supreme Court of the United States for its review and determination, the case of John H. Friederichsen, plaintiff in error, against Edward Renard in his own right, and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, defendants in error, revived in said circuit court of appeals on the 9th day of July, A. D. 1915,

(Record, pp. 117-118, fol. 133) as John H. Friederichsen, plaintiff in error, against G. H. Renard, as executor, and Herman F. Friedericks and Charles Cook, as administrators of the estate of Edward Renard, deceased, with the will annexed, and appearing in the printed transcript of the record (Record, p. 1, fol. 1) as John H. Friederichsen, plaintiff in error, against G. H. Renard, as executor of the estate of Edward Renard, deceased, et al., defendants in error, being case No. 4476, affirming the judgment of the district court of the United States for the district of Nebraska, Norfolk division, entered in said case dismissing the plaintiff's cause of action and adjudging him to go thence without day and awarding judgment against him for costs in the sum of \$165.04.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

1. Your petitioner, John H. Friederichsen, respectfully represents to this honorable court that on the 22d day of September, A. D. 1908, your petitioner by Messrs. Bibb & Bibb, solicitors of Louisa Court House, Virginia, filed his bill of complaint (Record, pp. 1-20, fols. 1-28) against said Edward Renard in his own right and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, in the circuit court of the United States for the district of Nebraska, Norfolk division, which said case was, by virtue of the provisions of section 290 of an act of congress of March 3, A. D. 1911, entitled "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," transferred to the jurisdiction of and vested in the district court of the United States for the district of Nebraska, Norfolk division.

2. Your petitioner represents to the court that jurisdiction of said case was had and obtained by said circuit and district courts by reason of a diversity of citizenship of the parties thereto, it being averred in said bill of complaint (Record, p. 1, fol. 2) and in the amended petition (Record, p. 55, fol. 60) subsequently filed in said case, pursuant to an order of said

district court, (Record, pp. 53-54, fol. 58-59) that your petitioner is and was a resident and citizen of the state of Virginia at the time said case was begun, and said respondents Edward Renard in his own right, and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore, were and are residents and citizens of the state of Nebraska, which said averment was and is admitted by the respondents respectively to be true (Record, p. 22, fol. 31; p. 36, fol. 49a; p. 65, fol. 73; p. 74, fol. 84a; p. 99, fol. 106).

3. That it is averred in said bill of complaint, as is the fact, that on the 22d day of February, A. D. 1905, and from thence until the 12th day of March, A. D. 1908, your petitioner was the owner and seized of an estate in fee simple in and to the following described real estate in Knox county, Nebraska, to-wit: The northeast quarter of section six (6), and the north half of the northwest quarter of section eight (8), all in township twenty-nine (29) north, range three (3) west of the sixth principal meridian, containing two hundred and forty (240) acres of the value of \$70.00 per acre, or \$16,800.00; and that said Mary C. Flatt (subsequently Mary C. Gilmore and since the commencement of said case Mary C. Gilmore Methven, and who is hereinafter called Mary C. Gilmore) was the owner, subject to a \$4,000.00 mortgage lien thereon to Jason C. Ayres of Dixon, Illinois, of the following described real estate situate in Louisa county, Virginia, to-wit: All that certain tract, piece, or parcel of land, situate, lying and being in the county of Louisa, state of Virginia, on both sides of the main county road leading from Louisa to Trevilians depot known as "Walnut Shade," containing two hundred and ninety-eight (298) acres of the value of \$5.00 per acre, or \$1,490.00.

4. That said Edward Renard, who on the 16th day of April, A. D. 1915, died testate and whose last will and testament was duly probated (Record, pp. 116, 117, fol. 132) in the county court of Knox county, Nebraska, on the 21st day of May, A. D. 1915, and whose estate is represented herein by

G. H. Renard as executor and Herman F. Friedericks and Charles Cook as administrators thereof with the will annexed, and in whose names said case was revived by an order of the circuit court of appeals of the Eighth circuit (Record, pp. 117, 118, fol. 132) after its removal thereto by writ of error, was the son-in-law of said Mary C. Gilmore, who was indebted to him in a large sum of money (Record, p. 135, fol. 25), but having no money or property, except said Louisa county, Virginia, land with which to pay said indebtedness, said Mary C. Gilmore made an arrangement with said Edward Renard by which he, the said Edward Renard, obtained possession and control of said Louisa county, Virginia, land with authority to sell and dispose of the same and appropriate the proceeds thereof to his own use, benefit and advantage.

5. That for many years prior to the 12th and 19th days of March, A. D. 1908, said Edward Renard had been and was a banker in the village of Bloomfield, Knox county, Nebraska, near which said village your petitioner's said Knox county, Nebraska, land, upon which he resided, was situated, in whom and whose bank your petitioner had great confidence and with whom he had long transacted business, and well knowing these facts and having full knowledge of your petitioner's ignorance, want of education, lack of business qualifications and experience, and that your petitioner was a German immigrant below the average in mental ability and development (Record, p. 51, fol. 55) and had been adjudged by competent authority to be of unsound mind (Record, p. 6, fol. 8) on the 22d day of February, A. D. 1902, and by order thereof had been confined in the Nebraska hospital for the insane at Norfolk, Nebraska, from thence until the 27th day of September, A. D. 1902, and that your petitioner was entirely ignorant of the value, fertility, state of development, cultivation and condition of said Louisa county, Virginia, land and of climatic conditions and customs prevailing in the locality thereof (your petitioner never having been in said state of Virginia nor seen or examined said land) and knowing that

your petitioner would rely on any statements that he, said Edward Renard, might make to your petitioner, said Edward Renard, acting for himself and as agent for Mary C. Gilmore and her husband, and with their knowledge and consent, offered to buy your petitioner's said Knox county, Nebraska, land for the sum of \$70.00 per acre, or \$16,800.00, and cause said Mary C. Gilmore and her said husband to convey to your petitioner said Louisa county, Virginia, land in part payment thereof at the sum of \$42.50 per acre, or \$12,750.00; and to that end the said Edward Renard then and there well knowing the same to be untrue, falsely represented and stated to your petitioner that said Louisa county, Virginia, land was worth \$55.00 per acre, but that he would take \$42.50 therefor, which was less than its value.

6. Said bill of complaint avers circumstantially and at length that, acting for himself and as agent for said Mary C. Gilmore and W. J. Gilmore, her husband, and with their knowledge and consent, said Edward Renard, by many and divers false and fraudulent representations and statements made to your petitioner respecting the value, location, state of development, cultivation and condition of said Louisa county, Virginia, land and the improvements thereon, and by the suppression of many material facts respecting the same, induced your petitioner and his wife, Adele Friederichsen, to enter into a written contract on the 12th day of March, A. D. 1908, (Record, pp. 91-93, fols. 96-98) to sell and convey your petitioner's said Knox county, Nebraska, land to said Edward Renard, he, said Edward Renard, assuming and agreeing therein to pay two promissory notes theretofore made by your petitioner, one for \$5,000.00 secured by a first mortgage on said Knox county, Nebraska, land and the other for \$2,500.00 secured by a second mortgage thereon, as a part of the consideration for the sale of your petitioner's said Knox county, Nebraska, land. And as further part consideration for said contract, said Edward Renard was to cause said Mary C. Gilmore and her husband, W. J. Gilmore, to convey to your peti-

tioner said Louisa county, Virginin, land for the sum of \$12,750.00 and your petitioner was to execute thereon a \$4,000.00 mortgage to Jason C. Ayres of Dixon, Illinois, in lieu of a mortgage thereon theretofore given by "Clara Gilmore" (Mary C. Gilmore), and to receive a deed of conveyance of said Louisa county, Virginia, land from said Mary C Gilmore, and W. J. Gilmore on the 1st day of July, A. D. 1908. Pursuant thereto your petitioner and his said wife, relying upon said representations and statements and believing them to be true, and actuated thereby, did on the 19th day of March, A. D. 1908, (Record, pp. 93, 94, folia. 99, 100) make, execute and deliver to said Edward Renard their warranty deed for said Knox county, Nebraska, land, subject to said two mortgages, which said mortgages said Edward Renard never paid or discharged, and delivered possession thereof to said Edward Renard; and on the 1st day of July, A. D. 1908, (Record, pp. 95, 98, folis. 101, 112) said Mary C. Gilmore and W. J. Gilmore, under date of the 19th day of March, A. D. 1908, made, executed and delivered to your petitioner in the state of Virginia, a deed for said Louisa county, Virginia, land for the stated consideration of \$12,750.00. It is averred in said bill of complaint, as the fact is, that your petitioner's said Knox county, Nebraska, land was well worth the sum of \$16,800.00, but that said Louisa county, Virginia, land was not worth, as said Edward Renard at the time well knew, to exceed \$5.00 per acre, or \$1,490.00, and that your petitioner sustained damages by reason of the difference in the value of the said respective tracts of land in the sum of \$13,345.00 and was compelled to and did lay out and expend in moving to the state of Virginia and in making improvements on said Virginia land, the result of said fraudulent representations, the sum of \$1,750.00, which was entirely lost to him and no part of which was ever paid. And said bill of complaint prays, *inter alia*, that said written contract of the 12th day of March, A. D. 1908, and said deed of conveyance of your petitioner and wife of said Knox county, Nebraska, land of the 19th day of March, A. D. 1908, be held void and cancelled, and that a re-

conveyance of said land be directed and your petitioner be reinvested with his said Knox county, Nebraska, land, and "that a decree be rendered against each and every of said defendants in favor of your orator for such damages as your orator has sustained by reason of the frauds and misconduct of said defendants in the premises, which amount will be ascertained by referring the matter to one of the commissioners of this court or by an issue out of chancery to be tried at the bar of this court, or as directed, and that all proper account be taken and had and all proper disclosures made," and "that all such other, further and general relief may be decreed your orator as the nature of his case may require and to this honorable court may seem meet and proper" (Record, p. 19, fol. 26), and for process.

7. That on the 22d day of September, A. D. 1908, a writ of subpoena in due form under the hand and seal of the circuit court of the United States for the district of Nebraska, Norfolk division, was issued in said case and placed in the hands of the United States marshal for said district and state for service on said respondents, and was by him duly personally served on said respondents on the 1st and 2d days of October, A. D. 1908, and due return thereof made on the 6th day of October, A. D. 1908; and on the 29th day of December, A. D. 1908, said respondents filed in said court their respective answers to said bill of complaint (Record, pp. 22-33, fols. 30-48; pp. 35-47, fols. 49a-49q), to which your petitioner duly filed his replication (Record, p. 48, fol. 50) by which issues of fact in said case were presented for trial.

8. Your petitioner further avers that on the 17th day of April, A. D. 1909, the court (Honorable William H. Munger, Judge, presiding) on the stipulation of counsel for the respective parties appointed Honorable Isaac Powers of Norfolk, Nebraska, late attorney general of said state, master in chancery, *pro hac vice* in said case with full power to hear, try and determine the law and facts thereof and to make a full and final report therein to the court; that at sundry times there-

after, to suit the convenience of the parties and counsel, testimony and depositions were taken in due form by the respective parties on the stipulation of counsel to that effect, by which the actual value of said Knox county, Nebraska, land and said Louisa county, Virginia, land, as the same existed on the 12th and 19th days of March, A. D. 1908, was shown and on the 20th day of August, A. D. 1912, said master in chancery, *pro hac vice*, who had theretofore qualified and heard the testimony and argument of counsel in said case, filed his final report in said case, in which he found, among other things, that the respondents committed the fraud upon the plaintiff which is averred in said bill of complaint and recommended a judgment in favor of your petitioner and against said respondents in the sum of \$5,880.00, but by reason of your petitioner's failure to restore, or offer to restore, which by reason of poverty he was unable to do, to said respondents the proceeds received for said Knox county, Nebraska, land, your petitioner was not entitled to a rescission of said contract. And on the 19th day of December, A. D. 1913, the court (Honorable William H. Munger, judge presiding) on exceptions of said respondents thereto, set aside said final report of said master in chancery, *pro hac vice*, and held that your petitioner was not entitled to equitable relief in said cause because, after the commencement thereof, he cut some timber or logs upon said Louisa county, Virginia, land, which, however, were never used or removed, which prevented said respondents from being placed in *statu quo* and constituted a ratification of the sale of said Knox county, Nebraska, land on the part of your petitioner, and that your petitioner's remedy for the fraud so committed on him by said respondents was at law, and said court (Honorable William H. Munger, judge presiding) by an order then duly entered of record (Record, pp. 53, 54, fol. 58, 59), transferred said case, under equity rule 22, to the law docket of said court, stating in said order that: "It is therefore ordered that the master's report be vacated and set aside and said action be and it is transferred to the law side of the court; and that complainant and re-

spondents file amended pleadings, to conform with an action at law," which said order remains in full force and effect; but denied the request of said respondents, "that the court find for and enter a decree dismissing complainant's bill for want of equity," (Record, p. 54, fol. 59) which said order is in full force and effect.

9. Your petitioner avers that on the 25th day of September, A. D. 1913, that being a judicial day of the regular September, A. D. 1913, term of said district court, said case came on "for hearing on the application of the defendants for leave to plead, and the court being fully advised, it is ordered that the defendants plead to the *bill* (amended petition) of the plaintiff filed herein, within sixty days from this date, to which order the plaintiff excepts," (Record, p. 54, fol. 60) and said order has never been modified, set aside, vacated or changed, but is still in full force. And that on the said 25th day of September, A. D. 1913, (Record, pp. 55-61, fols. 60-68) pursuant to said order, your petitioner filed his amended petition in said case in said district court, setting forth and stating therein the same identical cause of action averred in said bill of complaint and praying judgment against the respondents for \$13,345.00, with seven per cent annual interest thereon from the 19th day of March, A. D. 1908, and that on the 12th day of November, A. D. 1913, said respondents separately filed motions to strike said amended petition from the files, on the ground, among other things (Record, pp. 61-62, fols. 69-70; pp. 62-63, fols. 71-71a), "9. Because the cause of action set out in the amended petition is barred by the statute of limitations"; and on the 17th day of July, A. D. 1914, said district court (Honorable Smith McPherson, judge presiding) entered an order (Record, pp. 64-65, fols. 71b, 72) in said case reciting said order of said court (Honorable William H. Munger, judge presiding) overruling said respective motions of said respondents and directed that "the defendants shall answer to the merits of this case within twenty days from a receipt by their counsel of a copy of this order, and that they shall serve a copy of their answer, or answers, upon counsel

for the plaintiff at the time of filing the same, and that the plaintiff shall have fifteen days thereafter within which to reply, serving a copy of said reply upon counsel for the defendants," with which order your petitioner promptly complied. And on the 25th day of August, A. D. 1914, said respondents filed in said court their respective answers to the plaintiff's amended petition (Record, pp. 65-73, fol. 73-84; pp. 73-82, fol. 84a-84l), to which your petitioner filed his reply (Record, p. 87, fol. 92).

10. That on the 30th day of August, A. D. 1914, (Record, pp. 82-84, fol. 85, 86) your petitioner filed a motion in said case in said district court to strike out certain parts of the respective answers of said respondents to said amended petition, and on the 16th day of September, A. D. 1914, (Record, pp. 84, 85, fol. 87, 88) said motion was sustained by said court (Honorable Smith McPherson, judge presiding) and as a result thereof all of paragraphs 1 of each of said answers (Record, p. 65, fol. 73; p. 74, fol. 84a); all that part of paragraph 2 of each of said answers beginning with the words in the fourth line on page 1 as follows (Record, pp. 65, 66, fol. 74; pp. 74, 75, fol. 84b): "but this defendant alleges and states that on the 25th day of September, 1913, etc.," to the conclusion; all that part of paragraph 3 of said answers on pages 2, 3 and 4, beginning with the words on page 2 of Edward Renard's answer and page 3 of said Mary C. Gilmore's answer (Record, pp. 66, 67, fol. 75, 76; pp. 75, 76, fol. 84c, 84d), "and that at said time after the allegations as made in the bill of complaint, etc.," to the conclusion thereof; all of paragraph 4 of each of said answers found on page 4 of the answer of said Edward Renard (Record, pp. 67, 68, fol. 76, 77) and pages 4 and 5 of the answer of said Mary C. Gilmore (Record, p. 76, fol. 84e), and the words "is barred by the statute of limitations" in paragraph 5 of each of said answers (Record, p. 68, fol. 77; pp. 76, 77, fol. 84e); and all of paragraph 6 of each of said answers (Record, p. 68, fol. 77; p. 77, fol. 84e), and the following words in paragraph 7 of each of said answers (Record, pp. 68-72, fol. 78-83; pp. 77-81, fol.

84f-84k), "this defendant not waiving any of the objections to the jurisdiction of this court over either the parties or the subject-matter of the action as presented in said amended petition, and not waiving any matters of defense heretofore set forth; but still urging the same," were stricken out (Record, pp. 84, 85, fol. 87, 88); and said court entered the following order, "and it is further ordered and directed that the plaintiff shall reply to the remainder of said respective answers within five days after the entry of this order and serve a copy of the reply on counsel for said defendants." "And it further appearing to the court that this case has been pending for a number of years and ought to be tried at the approaching September term to begin and be holden at the city of Norfolk, Nebraska, commencing on the 21st day of September, 1914, and that a notice of trial has been properly filed and served by the plaintiff; it is further ordered that said case be and the same is hereby set down for trial at said term, to which the respective defendants except" (Record, p. 85, fol. 88), which said order has never been vacated, modified or set aside, but is still in force.

11. Your petitioner further avers that on the 21st day of September, A. D. 1914, which was a judicial day of the regular September, A. D. 1914, term of said court (Honorable Page C. Morris, judge presiding) the respondents asked "leave to file a plea in abatement," but "the same is hereby refused" (Record, p. 85, fol. 89), and the trial was set for the 4th day of November, A. D. 1914, at 9 o'clock a. m., at Norfolk, Nebraska, to which time and place said term of court was adjourned, and said order is still in full force and effect.

12. That on the 4th day of November, A. D. 1914, which was a judicial day of the regular September, A. D. 1914, term of said district court (Honorable Thomas C. Munger, judge presiding) the case was called for trial and the trial thereof proceeded to a jury duly impaneled for that purpose (Record, p. 88, fol. 93; p. 89, fol. 94), whereupon the respondents separately entered objections to the introduction of any testimony

and to the jurisdiction of the court (Record, pp. 88-90, fol. 93-95) for the reasons, among other things: (1) Because, under the pleadings, evidence and findings of the master and of the court, the action should be dismissed; (2) because the action was not and is not covered by rule 22 of the equity rules and was not properly transferred; (3) because no application has ever been made by any party to the action seeking or asking for a transfer of it to the law side of the court; (4) because no process of the court has ever been served upon the defendants or either of the defendants under the cause of action stated in the amended petition; (5) because the cause of action stated in the amended petition is a new cause of action from that stated in the original bill of complaint; (6) because the original cause of action and relief prayed for in the original bill of complaint being for a rescission of the contract on the ground of alleged fraud and is inconsistent with the relief sought and the judgment prayed in the amended petition, and the plaintiff having elected to pursue the former remedy is precluded by such election from now obtaining relief in this case, and (7) because under the record heretofore made in this case, the evidence and findings both of the master and of the court, the plaintiff is not entitled to judgment (Record, pp. 88-90, fol. 93-95). Said objections were by the court overruled and the respective defendants reserved exceptions thereto. But after your petitioner had introduced some evidence (Record, pp. 98-99, fol. 105), the bill of exceptions recites that: "The Honorable Thomas C. Munger, sole judge presiding, in open court, suggested to the attorneys of the respective parties that as the question of the statute of limitations arose in the case, to save cost and expense in the event the court should hold the action was barred by the statute of limitations and either party desired to remove the case to the circuit court of appeals on writ of error, it would be advisable for the parties to enter into a stipulation as to certain facts and consent that the jury be discharged for the time being to be recalled and the court reconvened at a time to be fixed by the court, to which the attorneys for the respective

parties gave their consent, and thereupon, pursuant to said suggestion, the parties hereto by and through their attorneys, respectively, made, signed and filed in the office of the clerk of the court a stipulation in writing" (Record, p. 100, fol. 107), in which it was agreed, among other things, "That the plaintiff has introduced sufficient evidence to show the jurisdiction of the court and to entitle him to recover a verdict at the hands of the jury in this case, but for the question of the statute of limitations, which is herein reserved for the further consideration of the court. If the court finds that the statute of limitations has barred the plaintiff's right of recovery in this case, then a verdict shall be directed for the defendants subject to the right of the plaintiff to have the same reviewed in this court and the circuit court of appeals by proper proceedings, and if the court finds that the statute of limitations does not bar the prosecution of this case on the amended petition, then the trial shall proceed to the jury as though this stipulation had not been made"; and therenpon the court dismissed the jury to be recalled at another time and took said stipulation and question under advisement. And on the 24th day of March, A. D. 1915, said court reconvened pursuant to adjournment (Honorable Thomas C. Munger, judge presiding) and the trial of the case was resumed (Record, pp. 102, 103, fol. 110): "Whereupon the court held and ruled that the cause of action stated in the plaintiff's amended petition was barred by the statute of limitations of the state of Nebraska, and that the filing of the amended petition did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations, to which holdings and rulings the plaintiff at the time duly excepted"; and "thereupon the court orally, over the objection of the plaintiff, instructed the jury to return a verdict for the defendants, to which ruling the plaintiff at the time duly excepted, and the jury by William R. Martin, their foreman, did accordingly return a verdict in favor of said defendants that the plaintiff had no cause of action, but the plaintiff objected to the court receiving, filing, or recording said verdict, which said objec-

tion was overruled and the plaintiff duly excepted thereto and said verdict was received, filed, and recorded, to which also the plaintiff duly excepted," and a final judgment was entered by said court on said verdict (Record, pp. 105-107, fols. 113-115), ordering and adjudging that the plaintiff's cause of action be dismissed and that the defendants recover their costs taxed at \$165.04; and thereupon your petitioner filed a motion for a new trial which was overruled (Record, pp. 107, 108, fols. 116, 117), to which ruling he reserved an exception, and thereupon he perfected a writ of error to the circuit court of appeals for the eighth circuit (Record, pp. 109-116, fols. 118, 131).

13. That in his assignment of errors and prayer for the reversal of the judgment of said district court, and in his brief and argument in support thereof in said circuit court of appeals, your petitioner presented to said circuit court of appeals the following questions (Record, pp. 109-110, fols. 118-120): (1) That the court erred in ruling and holding that the order of the court entered in this case on the 19th day of September, 1913, transferring the case from the equity to the law docket and directing the complainant and respondents to file amended pleadings to conform to an action at law; and the further order of the court, the Honorable Smith McPherson presiding, entered on the 17th day of July, 1914, denying the motion of the respective defendants, which were in part based upon the statement that the cause of action stated in the amended petition is and was barred by the statute of limitations at the time said amended petition was filed; and by the further order of the court, the Honorable Page Morris presiding, entered on the 21st day of September, 1914, denying to the respective defendants the right to file a written plea setting up *inter alia* the plea of the statute of limitations, said respective orders having never been vacated or set aside, the question of the statute of limitations passed into judgment and beyond the further jurisdiction of the court, and the court, the Honorable Thomas C. Munger presiding, was without jurisdiction or

power to disregard or set aside said orders or any of them, or to permit the plea of the statute of limitations, or to sustain such plea or the objections of the respective defendants based thereon; (2) the court erred in ruling and holding that the cause of action stated in the plaintiff's amended petition is and was barred by the statute of limitations of the state of Nebraska, at the time said amended petition was filed, and that said amended petition and the cause of action stated therein did not relate back to the commencement of the action in such a way as to prevent the bar of the statute of limitations; (3) the court erred in ruling and holding that the amended petition was filed after the statute of limitations had run and stated a new and distinct cause of action from the one stated in the original bill of complaint, or petition, and that the cause of action stated in said amended petition was barred by the statute of limitations at the time said amended petition was filed; (4) the court erred in ruling and holding that under the stipulation this action can not be maintained; (5) the court erred in instructing and directing the jury to return a verdict for the defendants; (6) the court erred in filing and recording the verdict of the jury; (7) the court erred in entering a final judgment herein in favor of the defendants and against the plaintiff and taxing the costs of the case against the plaintiff; and (8) the court erred in overruling the plaintiff's motion for a new trial.

14. Your petitioner represents that on the 25th day of March, A. D. 1916, said circuit court of appeals for the eighth circuit in *Friederichsen v. Renard, et al.*, 231 Federal Reporter 882, affirmed the judgment of said district court on the following grounds: (1) That the rulings and orders of said district court (Honorable William H. Munger, Smith McPherson and Page Morris, judges presiding) herein entered were not binding on, but might be ignored by said court (Honorable Thomas C. Munger, judge presiding) without first being set aside on application therefor; (2) that in commencing the action on the equity side of the court your peti-

tioner conclusively elected his remedy and could not be permitted thereafter to amend his pleading and proceed at law; (3) that the amended petition stated a new, distinct and different cause of action from that contained in the bill of complaint and was barred by the statute of limitations in such a way as not to relate back to the commencement of the case, and (4) that its decision in said case did not conflict with its previous decisions on the same points and was not in conflict with the decisions of the supreme court of Nebraska.

15. That thereafter and within sixty days from the affirmance of the judgment in said case by said circuit court of appeals, your petitioner filed in said circuit court of appeals a petition for a rehearing for the following reasons: (1) Because the court erred in not sustaining and giving effect to each of the assignments of error numbered respectively one (1), two (2), three (3), four (4), five (5), six (6), seven (7) and eight (8), found on pages one hundred seven (107) and one hundred eight (108) of the record, to which reference is here made; (2) because the court erred in holding and ruling that the commencement of the case as a suit in equity constituted a conclusive election of remedies on the part of the plaintiff in error and prevented the transfer of the case from the equity to the law docket to be there treated and tried as an action at law on the plaintiff's amended petition; (3) because the court erred in holding and ruling that the amended petition introduced a new cause of action, which was barred by the statute of limitations; and (4) because the court erred in affirming the judgment of the district court and in not reversing its judgment and remanding the case for a trial, which said petition was denied by the court, to which ruling your petitioner reserved an exception.

16. Your petitioner further represents that the decision of the circuit court of appeals of the eighth circuit in *Friederichsen v. Renard, et al.*, 231 Federal Reporter 882, is in conflict with other decisions of said circuit court of appeals, with the decisions of this honorable court and with the decisions of the supreme court of Nebraska.

17. That this case involves the right of your petitioner to recover the sum of \$13,345.00 with seven per cent annual interest thereon from the 19th day of March, A. D. 1908, no part of which has ever been paid.

18. A certified copy of the entire record of said case in said circuit court of appeals is hereby furnished, attached to and made a part of this application and marked Exhibit "A" in compliance with rule 37 of this honorable court.

19. Your petitioner is advised and believes that said judgment of the United States circuit court of appeals in said case is erroneous and that this honorable court should require the said case to be certified to it for its review and determination in conformity with the provisions of section 240 of the Judicial Code, said case being made final in said circuit court of appeals by the provisions of section 128 of the Judicial Code.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States circuit court of appeals for the eighth circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said circuit court of appeals in said case entitled John H. Friedericssen, plaintiff in error, against G. H. Renard, as executor of the estate of Edward Renard, deceased, et al., defendants in error, No. 4476, to the end that said case may be reviewed and determined by this court as provided by section 240 of the Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with the provisions of the Judicial Code, and that said judgment of said circuit court of appeals in said case and every part thereof may be reversed by this honorable court.

JOHN H. FRIEDERICHSSEN, Petitioner.

By WILLIAM V. ALLEN,
His Attorney.

THE STATE OF NEBRASKA,
} ss.
Madison County,

William V. Allen, being first duly sworn, deposes and says that he is one of the counsel for John H. Friederichsen, the above named petitioner, and that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

WILLIAM V. ALLEN.

Subscribed and sworn to by said William V. Allen, before me and in my presence this 14th day of July, 1916.

GRACE E. MARRALL,
[Notarial Seal] *Notary Public.*

My commission expires January 8, 1920.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In support of his application for a writ of error, your petitioner, who was plaintiff in the district court and plaintiff in error in the circuit court of appeals, submits the following points and authorities:

1. By the respondents' fraud your petitioner lost his valuable Knox county land,—the savings of a lifetime,—for which he has not been compensated, nor has he had a trial upon the merits of his case.
2. As the jurisdiction of the circuit court (subsequently the district court) was based alone upon the diversity of citizenship of the parties, the judgment of the circuit court of appeals is final unless reviewed and reversed on writ of certiorari. Judicial Code, secs. 128 and 240; Loveland's Appellate Jurisdiction (1911), sec. 285, p. 630; Taylor's Jurisdiction and Procedure of the United States Supreme Court (1906), sec. 105, p. 161; *United States v. Beatty*, 232 U. S. 463-468, 58 L. ed. 686, 688.
3. The order of the district court (Honorable William H. Munger presiding) transferring the case from the equity to the law docket was unnecessary, as the court as a court of equity had jurisdiction to grant relief in damages. (*Rosen v. Mayer*, 113 N. E. [Mass.] 217, 218; *McLennan v. Church*, 158 N. W. [Wis.] 73, 75, *et seq.*; *Stevens v. Coates, et al.*, 78 N. W. [Wis.] 180, 181; *Franey v. Warner*, 71 N. W. [Wis.] 81, 86; *Gates v. Paul*, 94 N. W. [Wis.] 55, 62; *Knauf & T. Co. v. Elkhart Lake Sand & G. Co.*, 141 N. W. [Wis.] 701, 705; 48 L. R. A. (N. S.) 744; *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, 133-134), but the district court had a right to transfer the case to the law docket if deemed advisable and jurisdiction was not thereby lost. *United States Bank v. Lyon County*, 48 Fed. 632, 633-635; *Schurmeier v. Connecticut Mutual Life Ins. Co.*, 171 Fed. 1, 8; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641-661, 34 L. ed. 295, 300.

In *Corsicana National Bank v. Johnson*, 218 Fed. 822, 823-824, it is said:

But a dismissal of the bill did not properly follow from that conclusion. The case is one calling for the application of equity rule 22. The decree, instead of dismissing the bill, should have ordered a transfer of the suit to the law side of the court, to be there proceeded with pursuant to the requirement of the rule mentioned.

In *Illinois Surety Co. v. United States*, 212 Fed. 136, 139, it is said:

The better way to have raised the question would have been by moving to have the cause transferred from the law to the equity calendar, but it has been sufficiently raised.

And this rule, as well as section 274q of the Judicial Code, is applicable to this case. *Collins v. Bradley Company*, 227 Fed. 199, 201. The order of transfer did not make it a new case or change the venue to another court. *United States Bank v. Lyon County*, 48 Fed. 632, 633-635.

4. The honorable circuit court of appeals misconceived your petitioner's contention. It was not claimed that the failure of the district court (Honorable Thomas C. Munger presiding) to follow the prior rulings of the court (Honorable William H. Munger, Smith McPherson and Page Morris presiding, respectively,) in any way "affected the power of this court (the circuit court of appeals) to review the final judgment." (*Friederichsen v. Renard, et al.*, 231 Fed. 882, 884). But the contention was and is that the orders of the district court made by these judges,—the one transferring the case to the law docket and refusing to dismiss it, from which there was no appeal, which order was not modified or changed; of another striking out the plea of the statute of limitations, and of the last refusing to permit such plea to be filed,—became conclusive in the absence of an order changing them and could not be ignored or inched aside. In the absence of an order setting them aside they were final. *Jayne's Executrix v. Plat*, 47 O. St. 262, 271; *Lowrie v. Castle, et al.* 113 N. E. (Mass.) 206, 208.

5. The fact that the case "proceeded to a termination which would have resulted in the dismissal of the bill had not the court decided that the course marked out by equity rule 22 ought to be followed," was not a judgment of dismissal, nor *res judicata*, nor did it deprive the district court of power to make the transfer. *Jayne's Executrix v. Platt, supra; Lowrie v. Castle, et al, supra.*

6. It is said in the opinion, (*Friederichsen v. Renard*, 231 Fed. 882, 884) that: "It appears from the report of the master and from the memorandum of the court that the cause in equity failed because Friederichsen had not refunded, nor offered to refund the money paid to him by Renard on the exchange of the lands and also that Renard (*Friederichsen[?]*) with knowledge of the character of the Virginia land had cut valuable timber therefrom," and this is held to be a conclusive election of remedies. But if Friederichsen failed in that respect he never had a remedy in equity and election of remedies does not apply. *Babcock-Cornish v. Urquhart*, 101 Pac. (Wash.) 713; *McFadden v. Thorpe Elevator Company*, 118 N. W. (N. D.) 242; *Harrill v. Davis*, 168 Fed. 187, 22 L. R. A. (N. S.) 1153, 1158; *Hogan v. Weyer*, 5 Hill (N. Y.) 389; *Steinke v. Dobson*, 90 Neb. 616.

In *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 45, it is said:

The fact that a party through mistake attempts to exercise a right to which he is not entitled, or has made choice of a supposed remedy that never existed, and pursued it until the court adjudged that it never existed, should not and does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled. *Wm. W. Bierce Lumber Co. v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. ed. 828; *Barnsdall v. Waltmeyer*, 142 Fed. 415, 73 C. C. A. 515; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53, L. R. A. 603, 84 Am. St. Rep. 867; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

In *Union Central Life Insurance Co. v. Drake*, 214 Fed. 536, 548, it is said:

The controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory. *Rankin v. Tygard*, 198 Fed. 795, 806, 119 C. C. A. 591, 602; *Bierce v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. ed. 828; *Thomas v. Sugarman*, 218 U. S. 129, 133, 30 Sup. Ct. 650, 54 L. ed. 967, 29 L. R. A. (N. S.) 250; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 398, 399, 20 C. C. A. 468, 472, 473, 33 L. R. A. 739; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515, 520; *Harril v. Davis*, 168 Fed. 187, 195, 94 C. C. A. 47, 55, 22 L. R. A. (N. S.) 1153; *In re Stewart* (D. C.) 178 Fed. 463, 468; *Nauman Co. v. Bradshaw*, 193 Fed. 350, 354, 113 C. C. A. 274, 278.

In *Register v. Carmichael*, 34 L. R. A. (N. S.) 309, 311, it is said:

The theory of the appeal is that plaintiff was estopped to sue on the cause of action alleged, because she had elected by her bill in chancery to assert an antagonistic right. But an election, to be conclusive, must be efficacious to some extent at least. The mere bringing of a suit is not determinative of the right. The party against whom the estoppel is pleaded must have received some benefit under his election. *Harrison v. Harrison*, 39 Ala. 489; *Hunnicutt v. Higginbotham*, 138 Ala. 472, 100 Am. St. Rep. 45, 35 So. 469.

In *Commercial National Bank of Kearney v. Faser*, 155 N. W. (Neb.) 600, 602, it is said:

A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction thereon, will not deprive him of a right to which he is properly entitled.

In *Clark v. Heath*, 8 L. R. A. (N. S.) 144, 146, it is said:

Mistake of remedies differs from an election between inconsistent remedies. *Sullivan v. Ross*, 113 Mich. 311, 318, 71 N. W. 634, 76 N. W. 309. The rule that "the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative

"remedy," does not apply if in reality he had only one remedy. 7 Enc. Pl. & Pr., p. 363; *Morris v. Rexford*, 18 N. Y. 552; 15 Cyc. Law & Proc., p. 262.

The following cases are directly to the point that if the law affords but one remedy, but in the commencement and prosecution of an action the plaintiff mistakes his remedy, that does not constitute an election. He may adopt the right remedy and proceed with the case to a conclusion. *State v. Bank of Commerce*, 61 Neb. 22, 25, 26, 27; *City of Omaha v. Redick*, 61 Neb. 163, 166; *Grand View Building Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 154, 155; *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 875; *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unof.) 225, 228, 229; *Simons v. Fagan*, 62 Neb. 287; *Walters v. Chicago, B. & Q. R. Co.*, 74 Neb. 551, 556; *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 783, 784, 786; s. c. 76 Neb. 786, 787, et seq.; *Brown v. Fletcher*, 182 Fed. 963, 971, et seq.; *Northern Assurance Co. of London v. Grand View Building Ass'n*, 205 U. S. 106, 108, 51 L. ed. 109, 111; *Bierce Lumber Co. v. Hutchins*, 205 U. S. 340, 347, 51 L. ed. 828; *Barnsdall v. Waltemeyer*, 142 Fed. 415; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L. R. A. 603; *Rowell v. Smith*, 102 N. W. (Wis.) 1; *Sullivan v. Ross*, 71 N. W. (Mich.) 634; s. c. 76 N. W. (Mich.) 309; *Brady v. Daly*, 175 U. S. 148-161, 44 L. ed. 109, 114; *Thomas v. Sugarman*, 218 U. S. 129, 54 L. ed. 967; *Zimmerman v. Harding*, 227 U. S. 489-496, 57 L. ed. 608, 610; *Missouri Pacific Ry. Co. v. Larabee*, 234 U. S. 459-475, 58 L. ed. 1398, 1399; 9 Ruling Case Law, p. 963 and notes; *Moon v. Hartsuck*, 114 N. W. (Ia.) 1043, 1044; *Asher v. Pegg*, 123 N. W. 739; *Courtney v. Courtney*, 129 N. W. (Ia.) 52.

7. An unsuccessful prosecution of a suit to rescind a contract of exchange of property on the ground of fraud, does not constitute an election of remedies so as to defeat the plaintiff from suing for the value of his property. *Freeman v. Fehr*, 157 N. W. (Minn.) 587, 588; *Dooley v. Crabtree*, 109 N. W. (Ia.) 889, 890; *International Realty & Sureties Co. v. Vanderpoel*, 148 N. W. (Minn.) 895, 896; *Marshall v. Gilman*, 53 N. W. (Minn.) 811, 812. An attempted rescission of a contract

by suit, is not a bar to an action for damages for fraud. *Cohoon v. Fisher*, 36 L. R. A. 193, 195; *Jones v. Magoon, et al.*, 138 N. W. (Minn.) 686, 687.

8. To amount to an election of remedies, the plaintiff must have prosecuted his first action to a final judgment or decree which has not been disturbed on appeal. *Capital City Bank v. Hilson*, 32 Am. & Eng. Ann. Cas. 1211, 1220; *Bowen v. Mandeville*, 95 N. Y. 237; *Simone v. Fagan*, 62 Neb. 287; *Shuttlefield v. Neil*, 145 N. W. (Ia.) 1, 11; *Virtue v. Creamery Package Manf. Co.*, 142 N. W. (Minn.) 930, 940; *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25; *Smith v. Bricker*, 53 N. W. (Ia.) 250, 251; *Clark v. Heath*, 8 L. R. A. (N. S.) 144, 146; *Elgin National Watch Co. v. Meyer*, 29 Fed. Rep. 225; *Bandy v. Cates*, 97 S. W. (Tex.) 710, 711; *Kinney v. Kiernan*, 49 N. Y. 164, 168-170; *Zimmerman v. Robinson & Company*, 102 N. W. (Ia.) 814-816; *Powell v. Dayton, S. & G. R. Co.*, 8 Am. St. Rep. 251; *Agar v. Winslow*, 69 Am. St. Rep. 84; *Fisher v. Brown*, 111 Ill. App. 486; *Kittredge v. Holt*, 58 N. H. 191; *Shanahan v. Coburn*, 87 N. W. (Mich.) 1038, 1039; *Kelsey v. Murphy*, 26 Pac. 78; *Brooks v. Romano*, 42 So. (Ala.) 819-821; *Redhead Brothers v. Wyoming Cattle Inv. Co.*, 102 N. W. 144; *Fuller-Warren Co. v. Harter*, 53 L. R. A. 603; *First National Bank v. Sweet*, 99 N. W. (Mich.) 861.

9. The order of the court (Honorable William H. Munger presiding), transferring the case from the equity to the law docket and directing an amendment of the pleadings, is binding as to the identity of the cause of action stated in the bill of complaint and in the amended petition. *Lowrie v. Castle, et al.*, 113 N. E. (Mass.) 206, 208; *Tracey v. Boston Elevated Ry. Co.*, 204 Mass. 13, 16, 17, 90 N. E. 416.

10. There was no election of remedies. The rule is without exception that to constitute an election of remedies a party must have at his command different co-existing remedial rights which are inconsistent and not analogous, consistent or concurrent. Before a case arises for the application of the doctrine of election of remedies there must be (1) two co-existing

remedies; and (2) they must be so inconsistent that a party can not logically choose one without repudiating the other. If the law affords but one remedy but the plaintiff in the commencement of an action mistakes his remedy, that does not constitute an election. He may thereafter adopt the right remedy and pursue the case to a conclusion. *Commercial National Bank of Kearney v. Faser*, (Dec. 3, 1915) 155 N. W. (Neb.) 601, 602; *State v. Bank of Commerce*, 61 Neb. 22, 25, 26, 27; *City of Omaha v. Redick*, 61 Neb. 163, 166; *Grand View Building Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 154, 155; *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 875; *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unof.) 225, 228, 229; *Simons v. Fagan*, 62 Neb. 287; *Walters v. Chicago, B. & Q. R. Co.*, 74 Neb. 551, 556; *Chicago, B. & Q. R. Co. v. Healy*, 76 Neb. 783, 784, 786; s. c. 76 Neb. 786, 787, et seq.; *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 45; *Brown v. Fletcher*, 182 Fed. 963, 971; *Northern Assurance Co. of London v. Grand View Building Ass'n*, 205 U. S. 106, 108, 51 L. Ed. 109, 111; *Bierce Lumber Co. v. Hutchins*, 205 U. S. 340, 347, 51 L. Ed. 828; *Barnsdall v. Waltemeyer*, 142 Fed. 415; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L. R. A. 603; *Rowell v. Smith*, 102 N. W. (Wis.) 1; *Sullivan v. Ross*, 71 N. W. (Mich.) 634; s. c. 76 N. W. (Mich.) 309; *Brady v. Daly*, 175 U. S. 148-161, 44 L. Ed. 109, 114; *Clark v. Heath*, (Me.) 8 L. R. A. (N. S.) 144; *Thomas v. Sugarman*, 218 U. S. 129, 54 L. Ed. 967; *Zimmerman v. Harding*, 227 U. S. 489-496, 57 L. Ed. 608, 610; *Missouri Pacific Ry. Co. v. Larabee*, 234 U. S. 459-475, 58 L. Ed. 1398, 1399; 9 Ruling Case law, p. 963 and notes; *Moon v. Hartsuck*, 114 N. W. (Ia.) 1043, 1044; *Asher v. Pegg*, 123 N. W. 739; *Courtney v. Courtney*, 129 N. W. (Ia.) 52.

11. The fraudulent transaction, and cause of action arising thereon averred in the bill of complaint, is the identical fraudulent transaction and cause of action averred in the amended petition. This being true, the cause of action stated in the amended petition relates back to the commencement of the action so as to prevent the bar of the statue of limitations. "Both the bill of complaint and the original petition *allege the*

same facts as a basis for relief sought by each of them" (respondents' brief in the circuit court of appeals, p. 5). It is held in the following cases that the amendment did not introduce a new cause of action and by relation prevented the bar of the statute of limitations. An amendment for the rescission of a contract on the ground of fraud, to an action for damages on account of the same fraud, (*Cahoon v. Fisher*, 36 L. R. A. 193; *Freeman v. Fehr*, 157 N. W. (Minn.) 587, 588; *International Realty & Sureties Co. v. Vanderpoel*, 148 N. W. (Minn.) 895, 896); from an action to recover damages for fraud, to an action to recover damages on an express warranty, (*Culp v. Steere*, 47 Kans. 746); from an action for damages for fraud in the exchange of lands, to a suit in equity to rescind the contract (*Smith v. Bricker*, 53 N. W. (Ia.) 250, 251-252); from an action for rescission to an action for breach of warranty (*Zimmerman v. Robinson*, 102 N. W. [Ia.] 814); from an individual action for damages for death of an unmarried and childless son while in defendant's service, to an action in a representative capacity under employer's liability act (*Missouri, Kansas & Texas Ry. Co. v. Wolf*, 226 U. S. 570, 578, 57 L. Ed. 355, 357, 363); from an action in *assumpsit* on the common counts and an account stated, to an action on a written contract (*Miller v. Watson*, 6 Wend. [N. Y.] 506); from an action in ejectment, to a suit to redeem (*McKeighan v. Hopkins*, 19 Neb. 33; *Butler v. Smith*, 84 Neb. 78, 82); from an action to quiet title, to a suit to redeem (*Butler v. Secrist*, 92 Neb. 506, 509); from ejectment to a suit to foreclose a land contract (*Scroggin v. Johnston*, 45 Neb. 714, 719); from an action to recover damages for fraud and the conversion of property, to a suit in equity (*Rawlins v. Myers*, 96 Neb. 819, 822); from an action for damages for personal injury through the negligence of a third person, to an action against the defendant for his negligence and that of his foreman (*Johnson v. American Smelting & Refining Co.*, 80 Neb. 256, 262-263); from an action for damages for an assault and shooting, to an action for damages for negligent shooting (*Carmichael v. Dolen*, 25 Neb. 335, 338); from an action for a penalty for

usury under section 5198, United States Rev. Stat., to many causes of action therefor (*Schuylar National Bank v. Bollong*, 28 Neb. 684); from a suit to remove a cloud and quiet title to real estate, to an action of ejectment (*Homan v. Hellman*, 35 Neb. 414, 415-416); from an action for damages for personal injuries while wiping a belt of running machinery, by adding an allegation that it was not within the purview of his employment (*Norfolk Beet Sugar Co. v. Hight*, 59 Neb. 100, 104); in an action for damages under Lord Campbell's act by adding that at the time of the intestate's death he was earning a salary of \$1,800.90 (*Chicago, R. I. & Pac. Ry. Co. v. Young*, 67 Neb. 568, 569); from an action on an implied contract to recover insurance premiums advanced on a rejected application, to an action on a written contract (*Witt v. Old Line Bankers Life Ins. Co.*, 92 Neb. 763, 765); from an action for damages on a written contract, to an action to recover for a different breach of contract (*Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 96 Neb. 458, 460); from an action for damages for common law negligence, to an action for damages for specific negligence (*Davis v. Manning*, 97 Neb. 658, 660); from a common law action for damages for negligence, to an action for damages under the federal employer's liability act (*Zitnik v. U. P. R. Co.*, 95 Neb. 152, 153, *et seq.*); from an action by the plaintiff in her own name as the sole beneficiary of a deceased employee, to an action by her as administratrix under the employer's liability act (*Anderson v. Louisville & N. R. Co.*, 210 Fed. 689, 695; *Strother v. U. P. R. Co.*, 220 Fed. 731, 732); from an action on a federal contractor's bond in which the petition failed to allege that there had been a completion of the contract and final settlement, by adding such allegation (*Illinois Surety Co. v. United States*, 215 Fed. 334, 339); from an action for damages by an administrator for the death of his intestate by suffocation in the mine of the defendant, by adding three counts alleging negligence in failing to maintain a safe and secure place for plaintiff's intestate to work (*Alabama Consol. Coal & Iron Co.*,

v. *Heald*, 45 So. [Ala.] 686, 687); in ejectment by adding an additional count on the same title under a new demise (*Bentley v. Crummey*, 119 Ga. 911, 47 S. E. 209); by adding *quantum meruit* to an action on express contract (*Agency v. Gopceric*, 137 Pac. 609); from a suit to quiet title, to ejectment (*Hillyer v. Douglass*, 56 Kan. 97, 52 Pac. 129); from an action at law, to a suit in equity (*Truman v. Lester*, 71 N. Y. App. Div. 612); from an action on contract, to *tort* (*Eighmie v. Taylor*, 39 Hun. [N. Y.] 366; *Smith v. Bellows*, 77 Pa. St. 44); from action to establish boundaries, to trespass to try title and boundaries (*Bailey v. Laws*, 3 Tex. Civ. App. 529, 23 S. W. 70); from a suit in equity to foreclose a tax lien, by adding omitted averments of levying assessments of taxes (*Merrill v. Wright*, 41 Neb. 351; *Merrill v. Wright*, 54 Neb. 517); by adding a cause of action under the statute, to a common law action for damages by negligence (*Southern Railway Co. v. Simpson*, 131 Fed. 705); by changing action on contract, to an action on contract made by one defendant and other persons than those originally sued (*Atlantic & Pacific Ry. Co. v. Laird*, 164 U. S. 393-402, 41 L. Ed. 485, 486); from an action to recover on a treaty, to an action under a statute (*United States v. Dalcour*, 203 U. S. 408-429, 51 L. Ed. 248, 251); in ejectment to set out change of title (*Gannon v. Moore*, 104 S. W. [Ark.] 139, 140); from an action to sequester and recover, to an action against defendants who had taken the property with knowledge of the fraud (*Parlin & Orendorff Co. v. Glover*, 99 S. W. [Tex.] 592); from ejectment and damages against defendant, to a petition dismissing the action as to all defendants except appellant and to all land except that in controversy, and praying for possession and damages (*Smith v. Scott*, 122 S. W. [Ark.] 501); from an action on an oral contract for architect's services, in which the words, "in the event of contract for its consideration was made," were omitted (*Green v. Loftus*, 132 S. W. [Tex.] 502); from a plaintiff's action for damages and injuries to an invalid sister by wrongful and negligent treatment by the company's servants, to an action by the plaintiff in her own name (*Gulf, C. & S. F. Ry.*

Co. v. Overton, 107 S. W. [Tex.] 71); from an action on an express written contract, to an action on *quantum meruit* (*Water, Light & Gas. Co. v. City of Hutchinson*, 160 Fed. 41); from an action on contract, to an action for fraud (*Standard Sewing Machine Co. v. Owings*, 140 N. C. 503, 63 S. E. 345, 8 L. R. A. [N. S.] 582); from an action on *assumpsit* for the price of goods, to *trover* for their possession (*Clark v. Heath*, 8 L. R. A. [N. S.] 144); from an action for deceit for the price of goods, to an action for deceit and fraudulent representations inducing the sale (*Talcott v. Friend*, 179 Fed. 676); from an action to set aside a deed and mortgage of real estate, to an action to foreclose a mortgage (*Tuttle v. Burgett*, 30 L. R. A. 214); from an attachment and bill in chancery for fraud in procuring credit, to an action on purchase money notes (*Crossman v. Universal Rubber Co.*, 127 N. Y. 34, 13 L. R. A. 91); from an action in individual capacity, to an action in representative capacity (*Bixler v. Pennsylvania R. Co.*, 201 Fed. 553); from an action in representative capacity, to an action in plaintiff's individual capacity (*Atlanta, K. & M. R. Co. v. Smith*, 50 S. E. [Ga.] 106); from a suit to foreclose a mortgage in an individual capacity, to a suit to foreclose the same in a representative capacity (*Leahy v. Haworth*, 141 Fed. 850; *Hodges v. Kimball*, 91 Fed. 845; *Bourdreaux v. Tuscan Gas, Electric Light & Power Co.*, 33 L. R. A. [N. S.] 196); from covenant, to *assumpsit* (*Monahan v. Fidelity Mut. Ins. Co.*, 134 Am. St. Rep. 337); introducing new parties throughout the case (*El Paso & S. W. R. Co. v. Harris*, 110 S. W. 145); from an action for conversion to express *assumpsit* (*Hitson v. Hurt*, 101 S. W. [Tex.] 292); from a suit to cancel a patent, to an action for damages (*Bistline v. United States*, 229 Fed. 546, 548-549; *Brown v. Fletcher*, 182 Fed. 963); in an action on promissory notes, in which no jurisdictional fact is stated, permitting amendment to state jurisdictional facts (*Bison State Bank v. Billington*, 228 Fed. 116, *et seq.*); from an action as administratrix, to an action in a personal capacity (*Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260); from an action by a state treasurer in his official capacity, to an action by the

state (*McDonald v. State of Nebraska*, 101 Fed. 171); from an action on an account, to an action on express contract (*Patillo v. Allen-West Commission Co.*, 131 Fed. 680). See also cases cited on pages 14 and 15 of your petitioner's first brief and pages 6 and 7 of his reply brief in the circuit court of appeals.

12. But as a matter of fact neither the statute of limitations nor an election of remedies is presented in the record, as they were stricken from the separate answers of Renard and Gilmore by the order of Judge McPherson (record, pp. 84, 85, fols. 87, 88) in sustaining the plaintiff's motion to strike parts of said answers to the amended petition (record, pp. 82, 84, fols. 85, 86), and by his further order (record, pp. 64, 65, fols. 71b, 72) denying the respective motions of Renard and Gilmore (record, pp. 61-64, fols. 69, 70) to strike plaintiff's amended petition from the files on the ground that the cause of action stated therein was barred by the statute of limitations, and that by commencing the case as a suit in equity the plaintiff had conclusively elected his remedy. From these respective orders there was no appeal, nor was a motion or an application of any kind made to vacate or set either of them aside. In addition, these questions, as presented in paragraphs one, two, three, four and five of Renard's answer to the amended petition (record, pp. 65, 68, fols. 73-77) and in paragraphs two, three, four, five and six of Gilmore's answer (record, pp. 74-77, fols. 84b-84f) were tricken out by the order of Judge McPherson (record, pp. 82-84, fols. 85, 86), from which there was no appeal, nor was a motion or an application of any kind to vacate or set it aside made or ruled on.

13. An amendment to the petition will be allowed for the express purpose of avoiding the statute of limitations. *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed 1, where it is said (p. 8): "In the case at bar the original cause of action of the insurance company was purely a legal one. Resort to equity became necessary only to escape the subsequent bar of a limitation which might or might not be urged"; *Hatch v. Cen-*

tral Nat. Bank, 78 N. Y. 487; *Miller v. Watson*, 6 Wend. (N. Y.) 506; *Tobias v. Harland*, 1 Wend. (N. Y.) 93; *Sanger v. Newton*, 134 Mass. 308; *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461; *Thornton v. Herring*, 5 Houst. (Del.) 154; *Rand v. Webber*, 64 Me. 191; *Lottman v. Barnett*, 62 Mo. 159; *State ex rel. Mackey v. Thompson*, 81 Mo. App. 549. And if the amendment in any way retains any part of the cause of action asserted by the original petition, it is sufficient to prevent the running of the statute after the original petition was filed. *Texas & N. O. R. Co. v. Clippenger*, 106 S. W. (Tex.) 155, and cases cited.

14. The honorable circuit court of appeals confused the "cause of action" with the "remedy." "A cause of action may be defined in general terms to be a legal right, invaded without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application of such remedies as the laws may afford. But the cause of action, and the remedy sought, are entirely different matters." *Emory v. Hazard Powder Company*, 53 Am. Rep. 730, 732. "The 'cause of action' is therefore to be distinguished, also, from the 'remedy'—which is simply the means by which the obligation or the corresponding action is effectuated—and also from the 'relief' sought: Pomeroy on Pleading and Practice, sec. 453." *Frost v. Witter*, 84 Am. St. Rep. 53, 58. See *McAndrews v. Chicago, L. S. & E. Ry. Co.*, 162 Fed. 856, 858; *Meyers v. Moore*, 78 Neb. 448.

15. The prayer of a pleading is not its test. It "is no portion of the statement of facts required to constitute a cause of action." *Thompson v. State Traveling Men's Association*, 88 Neb. 399, 408-409-410; *Fox, Canfield & Co. v. Graves*, 46 Neb. 812, 816; *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 233, 237. The plaintiff may amend the prayer of his petition. *Cook v. Chicago, R. I. & P. Ry. Co.*, 39 N. W. (Ia.) 253; *Omaha & Republican Valley R. Co. v. Brown*, 29 Neb. 492, 622; *Wallingford v. Burr*, 17 Neb. 137; *Kritser v. Carey*, 9 N. W. (Wis.) 161; *Weaver v. Kitzley*, 12 N. W. (Ia.) 262; *Orton v. Scofield*, 21 N. W. (Wis.) 261.

16. The writ of *certiorari* will issue when "the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of state" is involved. *Forsyth v. Hammond*, 166 U. S. 506-520, 41 L. Ed. 1095, 1098.

17. The decision in this case is in direct conflict with *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed. 1-8, which in effect overrules *Whalen v. Gordon*, 95 Fed. 305-315, cited in the opinion of Judge Carland as authority. The opinion in *Whalen v. Gordon* was written by Sanborn, circuit judge and concurred in by Thayer, circuit judge, and simply has reference to an Iowa statute, but there is a clear and able dissenting opinion by Caldwell, the senior circuit judge (pp. 315-320). The opinion in the Schurmeier case was written by Hook, circuit judge and concurred in by all the other circuit judges, except Sanborn, who wrote a dissenting opinion (pp. 9-11) declaring the decision in that case to be in "conflict with" *Whalen v. Gordon*. See analysis of *Whalen v. Gordon*, on pages 12-14 of your petitioner's brief in support of his petition for a rehearing in the circuit court of appeals. The decision in the instant case is in direct conflict with the following Nebraska cases which are binding on the statute of limitations. *McKeighan v. Hopkins*, 19 Neb. 33, 36; *Myers v. Moore*, 78 Neb. 448; *Butler v. Smith*, 84 Neb. 78, 82; *McCague Savings Bank v. Croft*, 87 Neb. 770, 772; *Butler v. Secrist*, 92 Neb. 506, 509; *Rawlins v. Myers*, 96 Neb. 819, 823. See also cases cited on pages 14-15 of your petitioner's original brief in the circuit court of appeals, and on pages 7-11 of his brief in support of his petition for a rehearing in the circuit court of appeals.

The case of *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285-291, 39 L. Ed. 983, cited in the opinion in the instant case, is in conflict with *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570-577, 57 L. Ed. 355, 358, and other decisions of this court. This is recognized in *St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly*, 228 U. S. 702, 705, 57 L. Ed. 1031, 1033, and *Seaboard Air Line Railway v. Renn*, decided May 22,

1916, No. 15, United States Supreme Court Advance Opinions, pp. 567, 568. It is in conflict with *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 608, 36 L. Ed. 829, 833. This is the view taken in *Galesburg, K. & E. Ry. Co. v. Hart*, 221 Fed. 7, 12, 13, where it is said, that the *Wyler case* represents one line of thought and the *Cox case* another. Light is shed on the *Wyler case* in *Collins v. People's Power Co.*, 223 Fed. 47, 49, in which it is held that the statute of Iowa allowing amendments and providing for the commencement of actions is binding upon the federal court and that the *Wyler case* is not applicable. The *Wyler case* is repudiated in *Alabama Consol. C. & I. Co. v. Heald*, 45 So. (Ala.) 686, 690, where it is declared to be "in direct conflict with the overwhelming weight of authority," and "based upon antiquated principles and a misconception of the authorities cited, some of which were in effect overruled by the court entering them" and that it quotes from a Georgia case which "was subsequently in effect repudiated by the Georgia court." See analysis of the *Wyler case* on pages 14-15 of your petitioner's brief in support of his petition for a rehearing in the circuit court of appeals.

Robb v. Vos, 155 U. S. 13-45, 39 L. Ed. 52, cited in the opinion, is not in point. Robb and Strong voluntarily appeared and filed an answer and cross-bill in another case by which they sought to appropriate to themselves the proceeds of a mortgage, which was held to constitute an election and a ratification of the unauthorized acts of an agent in their behalf and they became thereby estopped as against innocent third parties. But in this case no "steps to enforce the contract" were taken, nor does an estoppel arise. The *Robb case* is clearly one of estoppel *in pais*. *Stuart v. Hayden*, 72 Fed. 402, 411, cited in the opinion is simply to the effect that where a party has two inconsistent remedies, the final election to pursue one waives the other. That is the general doctrine but does not apply to this case. But that case was taken to the supreme court, 169 U. S. 1-15, 42 L. Ed. 639; 170 U. S. 702, 42 L. Ed. 1204, and as finally disposed of is destroyed as authority. It is criticised in *McDonald v. Dewey*, 134 Fed. 528, 532, 533, and is in effect

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repudiated in *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 45. See cases cited on page 16 of your petitioner's brief in support of his petition for a rehearing in the circuit court of appeals.

The cases of *First National Bank of Chadron v. McKinney*, 47 Neb. 149, 151, 152; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 440; *Pollock v. Smith*, 49 Neb. 864, 868; *First National Bank of Chadron v. Tootle*, 59 Neb. 44, 46, 48, and *Boggs v. Young*, 81 Neb. 621, 624, cited in the opinion are cases of estoppel *in pais*. See their analysis on pages 16-19 of your petitioner's brief in support of his petition for a rehearing in the circuit court of appeals. They must be considered and taken in connection with the rule recognized in the cases cited on page 16 of your petitioner's brief in support of his petition for a rehearing in the circuit court of appeals, and other cited cases to the effect that an election is not final or complete until relief is obtained.

We have the honor, therefore, to submit that to the end that your petitioner may obtain justice, a writ of *certiorari* should issue and the judgment of said circuit court of appeals be reviewed and reversed.

Respectfully submitted,

WILLIAM V. ALLEN,

Madison, Nebraska,
Counsel for Petitioner.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

Number 669.

October Term, A. D. 1916.

JOHN H. FRIEDERICHSEN, PETITIONER,

VS.

**G. H. RENARD, AS EXECUTOR OF THE ESTATE
OF EDWARD RENARD, DECEASED, ET. AL.,
RESPONDENTS.**

DEFENDANT'S BRIEF.

STATEMENT OF CASE.

This original bill of complaint sought rescission of a contract of exchange of land made between the plaintiff and the defendant, Mary C. Gilmore, by the defendant, Edward Ren-

ard, as her agent, the grounds upon which the rescission was asked being the alleged misrepresentation and fraud of the defendant, Renard, by which the contract was induced. The prayer to the bill is as follows:

"First. That a full and complete disclosure be had from Edward Renard, Mary C. Gilmore and W. J. Gilmore, setting forth all and every transaction and dealing of each and every of said defendants with respect to the said false and fraudulent exchange and trade of properties aforesaid—showing each and every act and transaction in detail.

Second. That the said contract of March 12th, 1908, between your orator and wife and the defendants *agreeing to the exchange of properties, be declared and decreed fraudulent, null and void and of no force, effect or virtue.*

Third. That the aforesaid *deed* from your orator and wife to Edward Renard, dated March 19th, 1908, *conveying the said 240 acres of Knox County, Nebraska, lands, be declared and decreed null and void, of no force and virtue and that the same be cancelled and set aside as fraudulent.*

Fourth. If necessary, that such reconveyances be directed and had as to the Court may seem just, equitable and proper and your orator again invested with the Knox County, Nebraska, lands of which he has been fraudulently divested.

Fifth. That a decree be rendered against each and every of said defendants in favor of your orator for such damages as your orator has sustained by reason of the frauds and misconduct of said defendants in the premises, which amount will be ascertained by referring the matter to one of the Commissioners of this court or by an issue out of chancery to be tried at the bar of this court, or as directed, and that all proper account be taken and had and all proper disclosures made.

Sixth. That all such other, further and general relief may be decreed your orator as the nature of his case may require and to this Honorable Court may seem meet and proper.

Seventh. And may it please your honors to grant unto your orator a writ of subpoena of the United States of America, directed to the defendants, Edward Renard, in his own right and as agent for Mary C. Gilmore and W. J. Gilmore,

Mary C. Gilmore and W. C. Gilmore, commanding them and each of them, on a day certain, to appear and answer this bill of complaint, and to abide by and perform such order and decree as to this court shall seem proper, and required by the principles of equity and good conscience, and your orator will ever pray, etc." (See Pr. Rec., pp 19 and 20 Circuit Court of Appeals.)

The land formerly owned by the plaintiff is situated in Knox County, Nebraska. The land formerly owned by the defendant is situated in Louisa County, Virginia.

It is not alleged in any pleading of the plaintiff, as stated in paragraph 4 on page 3 (Pr. Rec., p. ----) of plaintiff's petition for writ of certiorari, nor was it in evidence that Edward Renard had possession and control of the Virginia land and authority to appropriate the proceeds from its sale to his own use and benefit.

It is not stated in the bill of complaint, as stated in paragraph 6 on page 6 of the petition for the writ of certiorari (see Pr. Rec., pp. --), that your petitioner sustained damages by reason of the difference in value of the said respective tracts of land in the sum of \$13,345.00. The only place such an allegation appears is in the amended petition filed on September 25, 1913. It is not a fact that, as alleged in paragraph 16 of the petition for the writ of certiorari (see Pr. Rec., pp. --), that the decision of the circuit court of appeals is in conflict with other decisions of said circuit court of appeals, with the decisions of this honorable court and with the decisions of the Supreme court of Nebraska. Nor is said decision in conflict with any decision of either of said courts.

The original bill of complaint was filed in this case on September 22, 1908; the answers were filed on December 29th, 1908; the replication was filed thereafter.

In April, 1909, an amendment was filed to each of the answers of the defendants, Renard and Gilmore, setting up that during the month of October and November, 1908, and after plaintiff had knowledge of the said conditions and facts surrounding said transaction complained of in the bill of complaint and had full knowledge of the value, situation and sur-

roundings of the real estate in Virginia involved in the action and after he had full knowledge of the truth and falsity of each and all of the misrepresentations set forth in his bill of complaint and after he had filed his bill of complaint in this action from said real estate in Virginia, the complainant, his agents and servants, at his request, cut not less than 1,400 logs which at the time of said trade and at the time of the filing of complainant's bill of complaint was standing and growing timber upon said farm in Louisa County, Virginia, and of the reasonable value of \$1,400.00, and that during the year 1909 and after the complainant had full knowledge of all the conditions, circumstances and facts surrounding the transaction complained of in the bill of complaint and full knowledge of the truth or falsity of each and all of the misrepresentations and after this action was commenced, the complainant permitted the trust deed which he and his wife had given to secure the sum of \$4,000.00 and which deed conveyed the real estate in Louisa County, Virginia, to be foreclosed and said real estate to be sold to Jason Ayres, the owner of said trust deed and indebtedness. The matters so set forth in the amendments were incorporated in and made a part of amended and supplemental answers filed in this case by the defendants, by leave of court, on the 24th day of December, 1912.

In January of 1909, on notice, testimony on behalf of the complainant was taken in Louisa County, Virginia. Again in November, 1909, on notice, the depositions of some of the same witnesses were retaken. In April, 1909, Hon. Isaac Powers, of Norfolk, Nebraska, was appointed master in chancery to make a finding of facts and report the same and his conclusions of law thereon. In November, 1910, the master took evidence at Louisa, Virginia, of some of the same witnesses taken in the depositions of January, 1909, and November, 1909. The complainant continued to take evidence until the 14th of March, 1911, when a "rest" was announced. The defendants in June of 1911 took all of their evidence. The last witness called and sworn in the case was one called and sworn in behalf of the complainant's main case.

The parties, complainant and defendant, having submit-

ted all of their evidence, and after arguments by counsel for both parties, submitted the same to the master in chancery, Hon. Isaac Powers, who, on the 20th day of August, 1912, filed his report, which appears on pages 49 and 53 of the printed record in Circuit Court of Appeals. The 16th and 18th findings of fact are as follows:

"16. That after taking possession of said Virginia land and after time for discovering the condition and value of said land had elapsed and after the commencement of the action to rescind the contract, the complainant cut down a large amount of the timber then growing on said land."

18. That complainant has sustained damages by reason of the acts and doings aforesaid of the defendants, Edward Renard and Mary C. Gilmore, in the sum of \$5,800, as follows: Loss of the 240 acres of Knox County land of the value of \$60 per acre, or \$14,400, less the value of defendants' interest in the Virginia land, which was worth \$15 per acre, or \$4,470, less the amount of the encumbrance thereon of \$4,000, leaving defendants' interest in said land of \$470, together with the assumption by the defendant, Renard, of the \$5,000 mortgage on the Knox County land, and also the \$3,050 paid complainant as a balance due in the exchange, leaving complainant's damage sustained as aforesaid in the sum of \$5,880." (See Pr. Tr. of Rec., p. 52.)

This report was submitted to the court, Hon. W. H. Munger presiding, and his order or judgment is as follows:

"This case having been submitted to the court upon the pleadings and evidence, the court finds that the complainant, by his own voluntary act in cutting from the timber upon the Virginia lands received by him in exchange for lands held by him in Nebraska—the amount of timber so cut consisting of at least some thirteen or fourteen hundred logs—has, by such action, prevented defendants being placed in *statu quo*, and such action being a ratification of the sale on the part of complainant, that complainant is not entitled to equitable relief, his remedy for the alleged fraud committed upon the part of defendants being one at law; that, by Equity Rule No. 22, it is provided—

"If, at any time, it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

It is, therefore, ordered that the master's report be vacated and set aside and said action be, and it is, transferred to the law side of the court; and that complainant and respondents file amended pleadings to conform with an action at law.

Defendants further except to the order and judgment of the court transferring the action to the law side of the court, and defendants each and severally request that the court find for and enter a decree dismissing complainant's bill for want of equity; which request is by the court overruled, to which defendants each severally except.

WM. H. MUNGER, Judge."

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(See Pr. Rec., pp. ——).

It is, therefore, of record in this case that the complainant tried out to an adverse finding, so far as he is concerned, his right to a rescission of the contract set forth in his bill of complaint, and under the facts established in this case and found by both the master in chancery and the court to whom the same was submitted and by the latter was adjudged and decreed to be without right to the relief sought. After having so tried out his right to rescind the contract without any application on his part whatsoever, but upon the motion of the court, the cause was transferred to the law side of the court. To the order transferring the case to the law side of the court the defendants objected and excepted.

The plaintiff's amended petition was filed as shown by the record; the motions of the defendants filed and ruled upon as shown by the printed transcript, and the ruling excepted to by the defendants. Thereafter answers were filed by the defendants and these in turn attacked by the plaintiff's motion, which was sustained, except as to the 8th paragraph of the motion calling for a reforming of the pleadings. (See Pr. Rec., pp. ——).^{274, R. 22} Replications were then filed to the answers.

The original complaint prayed for a rescission of the contract and for damages incident to such rescission, if granted, and which would place the complainant in *statu quo*. The master and the court found that because of the acts of the complainant committed after the action was commenced that he was not entitled to a rescission.

The amended petition is an action for damages for fraudulent representations inducing the contract, or an action for deceit. The amended petition was filed more than four years after the discovery of the alleged fraudulent representations or more than four years after the filing of the bill of complaint. Both the bill of complaint and the original petition allege the same facts as a basis for relief sought for by each of them, except as to the allegation of damages. (Pr. Rec. pp 1 to 20 and 55 to 60, Circuit Court of Appeals.)

The defendants each alleged in their answers to the amended petition, among other matters of defense, the foregoing facts as to the report of the master, the finding and order of the court on the evidence taken in the suit in equity, which matters on plaintiff's motion were stricken from the answers. The answers also set forth as a defense the fact that more than five years had elapsed since plaintiff had discovered the alleged fraud and that it was barred by the statute of limitations.

The Nebraska statute of limitations applicable is as follows:

7563. Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued.

7569. Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. Rev. Stat. (Ed. 1913), Secs. 7563 and 7569. The sections quoted were formerly Sec-

tions 5 and 12, respectively, of the Nebraska Code of Civil Procedure.

At the time of the making of the order transferring this action to the law side of the court, at all times since, and to all rulings on the motions made since, the defendants have excepted and have in all proper ways objected to the proceeding under the amended petition.

Having entered into the stipulation set forth on pages 99 to 102 of the printed record, a motion was made by the defendants for an instructed verdict, which was sustained by the court, and a verdict for the defendants was returned and judgment entered thereon. This judgment dismissing the plaintiff's cause of action was reviewed by the Circuit Court of Appeals for the Eighth Circuit and by it affirmed. (See Friederichsen vs. Renard et al., 231 Fed., 882). The plaintiff seeks by the writ of certiorari to bring the record so made to this court for review.

The writ prayed for should be denied for the following reasons:

1. No question of sufficient importance or of the character to authorize the issuance of the writ is presented and the decision does not conflict with the decision of any other circuit court of appeals or of the supreme court of Nebraska.
2. The decisions of the trial court and that of the Circuit Court of Appeals are right.
 - a. The cause of action set forth in the original complaint and the cause of action set forth in the amended petition are inconsistent.
 - b. To amend by changing the cause of action from one to rescind a contract to an action for damages for deceit is to commence a new cause of action and the statute of limitations runs until the filing of the amended petition.
 - c. If, in ruling upon a preliminary matter, a court commits an error it is not a final judgment and at any subsequent time prior to or at the entering of the final judgment the ruling may be changed.
3. That, were the effect of the rulings on the motions

of the defendant as made by Judge McPherson held to be that the statute of limitations had not run, it would require that such order be reversed as it is contrary to the rule of law to be applied in this case as decided by the supreme court of the State of Nebraska and by this court.

4. There is nothing in the record showing what questions were involved in Judge Morris' refusal to permit the filing of a plea in abatement hence the ruling presents no question for consideration upon which the plaintiff can base a right. (See Pr. Rec., pp. 85, Circuit Court of Appeals.)

5. Having instituted the action to rescind the contract, he prosecuted that action to an adverse finding by the court and that the only judgment which should have been entered in this case was a dismissal of the action, there being no rule ordering or permitting the transfer of the action to the law side of the court.

6. This action is not one within the provisions of Rule 22, because at the time this action was commenced it was properly commenced on the equity side of the court, and, but for the acts of the plaintiff committed after the action was commenced, the relief prayed for in the bill of complaint would have been granted.

7. That the action for damages presented in the plaintiff's amended petition is inconsistent with the action to rescind set forth in his bill of complaint and is the commencement of a new action, and, as the second shows more than four years having elapsed since the discovery of the alleged fraud, it is barred by the statute of limitations.

I.

No question of sufficient importance or of the character to authorize the issuance of the writ is presented.

In re Lan Ow Bew, 141 U. S. 583-589; 35 L. Ed. 868-870.

In re John Woods, 143 U. S. 202-206; 36 L. Ed. 125-126.

American Construction Co. vs. Jacksonville T. & K. W. Ry. Co., 148 U. S. 372-378; 37 L. Ed. 486-492.

Forsyth vs. Hammond, 166 U. S. 506-515; 41 L. Ed. 1095-1099.

III.

The decisions of the trial court and that of the Circuit Court of Appeals are right and in harmony with the decisions of this court and those of the Supreme Court of Nebraska.

(a) The two causes of action are inconsistent.

Whalen vs. Gordon, 95 Fed. 305.

Friederichsen vs. Renard et al., 231 Fed. 882.

Union Pac. R. R. Co. vs. Weyler, 158 U. S. 285-291.

Robb vs. Vos, 155 U. S. 13, 41-43.

Stewart vs. Hayden, 72 Fed. 403-411-412.

First Nat. Bk. of Chadron vs. McKinney, 47 Neb. 149, 151-2.

American Bldg. & Loan Ass'n. vs. Rainbolt, 48 Neb. 434, 440.

Pollock vs. Smith, 49 Neb. 864-868.

First Nat. Bk. of Chadron vs. Tootle, 59 Neb. 44, 46-48.

Boggs vs. Young, 81 Neb. t'21-624-5.

(b) To amend by changing the cause of action from one to rescind a contract to an action for damages for deceit is to commence a new cause of action and the statute of limitations runs until the filing of the amended petition.

U. P. Railway Co. vs. Weyler, 158 U. S. 285-289, 298; 39 L. Ed. 983.

Whalen vs. Gordon, 95 Fed. 305.

Friederichsen vs. Renard et al., 231 Fed. 882.

Railway Co. vs. Weyler, 158 U. S. 285, 289, 298; 39 L. Ed. 983.

In re Kamper, 142 Fed. 210-212.

Patello vs. Allen-West Com. Co., 131 Fed. 680.

Hall vs. The L. & N. R. Co., 157 Fed. 446.

Goodman vs. The City of Fort Collins, 164 Fed. 970-972.

Krotty vs. The Chicago & Great Western R. R. Co., 169 Fed. 593, 596.

Long vs. Choctaw O. & B. R. Co., 198 Fed. 38, 48.

Melvin vs. Hagadon, 87 Neb. 398.
Buerstetta, Adm'r., vs. Tecumseh Nat. Bank, 57 Neb. 504, 507-8.
Clifford vs. Thun, 74 Neb. 831, 833-4.
Westover vs. Hoover, 94 Neb. 596.
Johnson vs. Am. St. & R. Co., 80 Neb. 250-253.
Davis vs. Manning, 97 Neb. 658.

(c) If in ruling upon the motion to strike the amended petition or the motion to strike parts of the answer thereto the court committed error it can at any subsequent time prior to or at the entry of the final judgment change the effect of that ruling.

Knight vs. Finney, 59 Neb. 274.
Perry vs. Baker, 61 Neb 841, 843-845.
Tiernan vs. Miller & Leith, 69 Neb. 764, 765-766.
Follmer vs. State, 94 Neb. 217, 219.
Post vs. Pearson, 108 U. S. 418; 27 L. Ed. 774.

III.

But in addition to the foregoing reasons the defendants urge,—the writ should not issue because when the complainant brought his action to rescind the contract and prosecuted it to an adverse finding by the court, he elected his remedy and is bound thereby.

Robb vs. Vos, 155 U. S. 13, 41-43.
Stewart vs. Hayden, 72 Fed. 403, 411-412.
Turner vs. Grimes, 75 Neb. 412.
First Nat. Bank of Chadron vs. McKinney, 47 Neb. 149, 151-2.
Pollock vs. Smith, 49 Neb. 864-868.
First Nat. Bk. of Chadron vs. Tootle, 59 Neb. 44, 46.
Boggs vs. Young, 81 Neb. 621, 624-5.
Watson vs. Perkins, 88 Miss. 64.
Rowell vs. Smith, 123 Wis. 510.
Conrow vs. Little, 115 N. Y. 387, 393.
Quinn vs. Workingman's Building & Loan Assn', 7 Ky. Law Rep. (Abstract) 366.
Rohan vs. Same, Id.
Wilkins vs. Same, Id.

Blaker vs. Morse, 55 P. 274, 60 Kan. 24.
Missouri Pac. Ry. Co. vs. Henrie, 65 P. 665, 63 Kan. 330.
Sweet vs. Montpelier Sav. Bank & Trust Co., 77 P. 538, 69 Kan. 641.
Black vs. Miller, 42 N. W. 837, 75 Mich. 323.
Wright, Barrett & Stilwell Co. vs. Robinson, 82 N. W. 632, 79 Minn. 272.
In re Pedersen's Estate, 106 N. W. 958, 97 Minn 491.
Pederson vs. Christopherson, Id.
Nanson vs. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.
Citizens' Nat. Bank vs. Wetsel, 88 N. Y. S. 1079, 96 App. Div. 85.
Whipple vs. Stephens, 57 A. 375, 25 R. I. 563.
Rowell vs. Smith, 102 N. W. 1, 123 Wis. 510.
Herrington vs. Hubbard, 2 Ill. (1 Scam.) 569, 33 Am. Dec. 426.
White vs. White, 68 Vt. 161, 34 Atl. 425.
Wheeler vs. Dunn, 13 Colo. 428, 22 Pac. 827.
Marston vs. Humphrey, 24 Me. (11 Shep.) 513.
Dyckman vs. Sevaston, 39 Minn. 132, 39 N. W. 73.

IV.

Rule 22 does not apply to this case and there was no legal authority for its transfer.

No Question of Sufficient Importance or of the Character to Authorize the Issuance of the Writ is Presented and the Decision Does Not Conflict with the Decision of any Other Circuit Court of Appeals or a Decision of this Court or of the Supreme Court of Nebraska.

The jurisdiction of this court to review the judgments of the Circuit Court of Appeals should be exercised sparingly, and only when questions of gravity and importance are involved.

In re Lau Ow Bew, 141 U. S. 582-589; 35 L. Ed. 868-870.

On page 587 the court say:

"It is evident that it is solely questions of gravity and

importance that the Circuit Court of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified, can be properly invoked."

The foregoing has been approved in the following cases:

In re John Woods, 143 U. S. 202-206; 36 L. Ed. 125-126.

American Construction Co. vs. Jacksonville T. & K. W. Ry Co., 148 U. S. 372-387; 37 L. Ed. 486-492.

In re Woods involved a question similar to the one presented in this case in that it was a question of procedure and the construction of a statute of a state and this court said:

"But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect to the recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." (See p. 206, L. Ed. p. 126).

The doctrine declared in *Lan Ow Bew* *supra*, has never been modified but has been approved repeatedly.

The questions presented by this record are only:

1. Is the cause of action set forth in the amended petition barred by the Nebraska Statute of Limitations?
2. Does the fact that the district court finding the complainant has no case in equity and, assuming to act under Equity Rule 22, transfers a case from the equity side of the court to the law side of the court, with permission and direction to the complainant to file an amended petition, carry with it the decision that the amended petition when prepared under this order will state a cause of action, that is not barred by the statute of limitations?

3. Does the fact that the district court overrules a motion of the defendant, which moves to strike from the files the amended petition for reasons assigned one of which is "because the cause of action set out in the amended petition is barred by the statute of limitations", (Pr. Rec. pp. ~~6/26/08~~ 470), the reason for the overruling of such motion, as given by the court, being "the plaintiff was ordered to file his amended petition herein at law within sixty days thereafter the Honorable T. C. Munger presiding, and that the defendants were directed to file an answer thereto within sixty days thereafter and it further appearing to the court that instead of answering as directed the said defendants filed separate motions to strike the plaintiff's amended petition from the files but neglected to bring the same to the attention of the court and have it ruled upon. And it further appearing *** that the defendants' motion is without merit: It is therefor ordered by the court that the separate motions of the defendant is denied to which ruling said defendants severally except", (See Pr. Rec. pp. ~~6/26/08~~ 470) and the fact that the court at a later day sustains a motion to strike from paragraph V of the defendant's answer to the amended petition, which paragraph is as follows:

"That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and by his attorney prior to the 22nd day of September, 1908, when said action was commenced and prior to the first day of September, 1908, and that more than five years had elapsed after full knowledge by said plaintiff and his attorney of all of the facts and alleged fraudulent representations, and since the plaintiff cut and destroyed said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of action set forth in the amended bill of complaint is barred by the statute of limitations." the concluding words "is barred by the statute of limitations" because they state a conclusion of law (See Pr. Rec. pp. ~~6/26/08~~ 470) preclude the trial court, when the case comes on for submission, from ruling on the evidence and deciding that the action is barred by the statute of limitations, if, in fact, the action is so barred.

4. Does the fact that the trial court refuses to grant the request of the defendant, after the above described proceedings, to withdraw their answer and file a plea in abatement preclude such defendant from insisting on his defense of the statute of limitations and prevent the court from sustaining such defense.

So far as the plaintiff's case is concerned these are the only questions presented. There are no decisions on any question presented, by any circuit court of appeals other than that of the Eighth Circuit cited by the plaintiff and that court has decided in this case that there is no conflict in its decisions. There is no conflict between the decisions of the State Court and the decision in this case. There is no conflict between the decisions of this court and the decision of the Circuit Court of Appeals in this case. There is no question effecting the interest of the nation in either its internal or external relations.

The defendants have other defenses which preclude a judgment against them on this record.

They are:

5. This case was not one properly transferred from the equity side of the court to the law side of the court under Equity Rule 22.

6. The plaintiff having instituted a suit to rescind the contract and prosecuted it to a finding that he was not entitled to equitable relief thereby elected his remedy and cannot now pursue any other remedy.

7. The remedy sought through the original bill of complaint disaffirms the contract and the action for damages set forth in the amended petition affirms the contract. They are inconsistent actions.

Taking up the questions the plaintiff presents, it is seen that these questions are those of practice as to preliminary questions in procedure and, as the action set forth in the amended petition barred by the statute of limitations of the State of Nebraska.

The questions which will warrant this court in issuing the writ of certiorari are enumerated in the case of Forsythe

v. Hammond (*Supra*). After considering the previous decisions the court say,—

"We reaffirm in this case the propositions heretofore announced, to-wit, that the power of this court in certiorari extends to every case pending in the circuit court of appeals, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

Forsythe v. Hammond, 166 U. S. 514-515; 41 L. Ed. 1098-1099.

It will not be contended by the plaintiff that a national question of any character is involved. He has not so alleged, hence that question is passed.

Applying the rule announced by this court *In re Woods*, 143 U. S. 202-206, 36 L. Ed. 126 when considering Minnesota procedure and a Minnesota statute, that this case presents no questions of sufficient gravity or importance to warrant the issuance of the writ of certiorari. In that case the court say,—

"But we do not regard the inquiry as to whether it was settled law in the State of Minnesota that a judgment of dismissal in a former suit, such as pleaded here, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

In paragraph 16 of the petition for the writ it is alleged that the decision of the Circuit Court of Appeals in this case "is in conflict with other decisions of said Circuit Court of Appeals," but we challenge the attention of the court to the fact that an alleged conflict between decisions of the same Circuit Court of Appeals is not one of the grounds which will authorize the issuance of the writ of certiorari. It must be a conflict of decisions between two or more courts of appeal.

Coming, however, to this alleged conflict which relates to the decision in the case of Schurmier et al. vs. Conn. Mut. Life Ins. Co. 171 Fed. 1, 96 C. C. A. 107. The Circuit Court of Appeals which rendered that decision also rendered the decision in this case and also in the case of Whalen v. Gordon 95 Fed. 305; 37 C. C. A. 70. The most that could be claimed, if the position of the plaintiff were correct as to the effect of these decisions, is that the last case overruled the earlier case and was the law. It could not be a conflict "between two or more courts of appeal."

But the Circuit Court of Appeals of the Eighth Circuit should be permitted to interpret its own decisions and as its attention was directed to the Schurmier case the Circuit Court of Appeals considered it and decided that there was no conflict.

Friederichsen v. Renard, 231 Fed. 885.

Under any view of the case there is no conflict "between two or more courts of appeal."

The decision of the Circuit Court of Appeals in this case is unanimous. It is a proper application of the statute of the State of Nebraska and in harmony with the decisions of this court and of the Nebraska Supreme Court in applying it.

This court, the Circuit Court of Appeals, and the Supreme Court of Nebraska have all held that an action to rescind and an action for deceit are inconsistent.

Whalen v. Gordon, 95 Fed. 305.

Friederichsen v. Renard et al. 231 Fed. 882.

Union Pac. R. R. Co. v. Weyler, 158 U. S. 285-291.

Robb v. Vos, 155 U. S. 13, 41-43.

Stewart v. Hayden, 72 Fed. 403, 411-412.

First Nat. Bk. of Chadron v. McKinney, 47 Neb. 149, 151-2.
American Bldg. & Loan Ass'n v. Rainbolt, 48 Neb. 434, 440.
Pollock v. Smith, 49 Neb. 864-868.
First Nat. Bk. of Chadron v. Tootle, 59 Neb. 44, 46-48.
Boggs v. Young, 81 Neb. 621-624-5.

If the actions are inconsistent the one cannot be an amendment to the other and the statute of limitations runs until the amended petition is filed. On this question the decision of this Court, of the Court of Appeals and of the Supreme Court of Nebraska are harmonious.

Friederichsen v. Renard et al. 231 Fed. 882.
Whalen v. Gordon, 95 Feb. 305, 309.
Railway Co. v. Weyler, 158 U. S. 285, 289, 298; 39 L. Ed. 983.
In re Kemper, 142 Fed. 210-212.
Patello v. Allen-West Com. Co., 131 Fed. 680.
Hall v. The L. & N. R. Co., 157 Fed. 446.
Goodman v. The City of Fort Collins, 164 Fed. 970-972.
Krotty v. The Chicago & Great Western R. R. Co., 169 Fed. 593, 598.
Long v. Choctaw O. & C. R. Co., 198 Fed. 38, 48.
Melvin v. Hagadon, 87 Neb. 398.
Buerstetta, Adm'r. v. Tecumseh Nat. Bank, 57 Neb. 504, 507-8.
Clifford v. Thun, 74 Neb. 831, 833-4.
Westover v. Hoover, 94 Neb. 596.

It is therefore apparent that the action set forth in the amended petition is, under the decisions of the Federal courts and of the state court, inconsistent with the action set forth in the original bill of complaint: that it is a new cause of action and the statute of limitations runs from the discovery of the fraud until the filing of the amended petition. The facts as to fraud set forth in the amended petition were all in the bill of complaint which was filed on September 22, 1908, the amended petition was filed September 25, 1913, more than

five years after the commencement of the original action.

The statute of limitations in the State of Nebraska as to actions for fraud is four years. Rev. Stat. Secs. 7563, 7569, (Ed. 1913). (See Statute quoted in statement of case). This applied to fraud affecting real estate as well as personality.

Kohart v. Thomas, 4 Neb. (Unof.), 80, 84.

Forsyth v. Esterday, 63 Neb. 887.

Gillespie v. Cooper, 36 Neb. 775.

Hughes v. Honsel, 33 Neb. 703.

Ainsfield v. Moore, 30 Neb. 385.

It follows therefor that the decision in this case is not in conflict with other decisions of the Federal Courts or with the decision of the Supreme Court of Nebraska.

ANSWER TO POINTS MADE IN PLAINTIFF'S BRIEF UNDER THE HEAD OF "BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI" AND COMMENCING ON PAGE 9 OF PLAINTIFF'S PRINTED "PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF."

First. It is not a fact that the plaintiff has not had a trial on the merits of his case. He tried the case under his original bill of complaint to an adverse finding by the court under which there should have been a dismissal of the case.

Second. It is conceded by the defendants that the judgment of the Circuit Court of Appeals is final unless it is reviewed and reversed on the writ of certiorari.

Third. If it was unnecessary to transfer the case from the equity side to the law side of the court then it has no place here and this Court has no authority to reverse any judgment which may have been entered in the Circuit Court of Appeals. The order transferring the case to the law side of the court was objected to by the defendants and when the order was made was excepted to. The record so shows. And while the plaintiff did not ask or request the order transferring the case to the law side of the court he made no objections and took no exceptions to the order so made. The cases cited in

support of the proposition stated by plaintiff do not support him.

However, if it is the purpose of the plaintiff to object to this order and to assign it as an error it was not presented in the Circuit Court of Appeals and it was not presented to the trial court. This is the first attempt to raise the question and it cannot now be raised to plaintiff's advantage or the defendants' disadvantage.

Rogers v. Ritter, 12 Wall. 317, 320; 20 L. Ed. 417.

The Vanderbilt 6 Wall 225, 230; 18 L. Ed. 823.

Robinson & Co. v. Belt, 187 U. S. 41, 50; 48 L. Ed. 65.

Hageman v. Springer 189 U. S. 505; 47 L. Ed. 921.

This rule is not affected by state statutes.

St. Clair v. United States, 154 U. S. 134; 38 L. Ed. 936.

The district court did not have a right to transfer the case to the law docket. It was properly commenced on the equity side of the court and only the act of the complainant prevented the decree he sought. Plaintiff cites Cherokee Nation vs. S. K. R. Co. 135 U. S. 641-661; 34 L. Ed. 295, 300. This case does not support the plaintiff's contention. It holds that a law action and an equitable action cannot be joined but that as the petition is framed in the alternative and prays for damages the court held it to be a petition of appeal and nothing more. The Schurmier case does not sustain plaintiff's contention. It is considered by the court rendering the decision in it and in this case. The court deciding both cases knows better what it decided than does plaintiff.

United States Bank v. Lyon County (48 Fed. 632) is not in point. In that case the action was started as an equitable action when the complainant had a complete remedy at law and a demurrer to the bill was sustained on that ground. There was a motion by the complainant to transfer to the law docket which was granted. But in the present case there was an equitable action properly commenced but which was defeated by the complainant's own acts committed after he elected his remedy and which remedy he pursued for more than four years subsequent to the acts and which remedy he pursued to an adverse finding.

The district court, however, had no right to transfer the case to the law docket for the following reasons:

- a. It was not requested by the plaintiff.
- b. It was objected to by the defendant.
- c. It was not one of the cases which properly came under Rule 22 or any other rule permitting the transfer of cases, because at the time the case was instituted in September, 1908, the plaintiff, if his facts as alleged were established, was entitled to the relief prayed for and but for his own acts after the commencement of his action would have had a decree. If the facts were not established and could not be established as alleged in his bill he is not entitled to the relief prayed for in his amended petition filed on the law side of the court. It should be borne in mind at all times that if the plaintiff has been wronged the only reason that he is losing his remedy is because of his own wrongful act committed after the plaintiff had filed his original bill of complaint. The cases cited on pp. 19 and 20 in support of the propositions stated under the third subdivision of plaintiff's argument, do not conflict with these statements. It would take too much time and impose upon this court to review and distinguish all of the cases cited by the plaintiff. In each of the cases cited it was the same cause of action but in this case the distinction is clear between the case set forth in the bill of complaint and the case set forth in the amended petition. In the bill of complaint he sought to recover 340 acres of land situated in Knox County, Nebraska and damage incidentally caused to the plaintiff in making the change of residence from Knox County, Nebraska to Virginia. In the amended petition he seeks to recover the difference as he has alleged it between the actual value of the land in Louisia, Virginia, and the value as represented by the Defendant Renard. They are entirely distinct and separate. The one action seeks to transfer to the plaintiff a portion of the property now or at the time of the commencement of the action in the possession of the Defendant Edward Renard. The other action seeks to recover a judgment which would, if secured, in its enforcement take any part or all of the estate of the Defendant Renard until the judgment had been fully satisfied. The first is local and must

be brought in the court having jurisdiction where the land is situated while the case set forth in the amended petition may be brought wherever service can be secured upon the defendants. A reading of the cases cited in support of this subdivision of plaintiff's argument do not support the proposition the plaintiff advances as applied to the present case.

Fourth. In the portion of our argument heretofore presented we have called attention to that which is an answer to this proposition but we will restate it as briefly as we can. The point presented by the plaintiff is that, regardless of whether the statute of limitations is correctly applied to this case or not, because the order of Judge McPherson overruling the defendant's motion and the order of Judge McPherson sustaining the plaintiff's motion, not having been appealed from, they become the law of this case without any reason as to why the motions were sustained being given, the plaintiff claiming that the court in sustaining said motions held that the statute of limitations did not apply to this case, regardless of what the facts were. If this contention is true we are in the following condition: The rulings on those motions are not final orders. A final order under the ruling of all federal courts is such an order as determines the litigation between parties so that nothing remains but to enforce the judgment entered. That the appellate jurisdiction is restricted to final judgments see the following cases:

Robinson v. Belt, 6 Fed. 328.

Gladys Bells Oil Co. v. Mackey, 216 Fed. 129.
and many other cases by the Circuit Courts of Appeals.

McLish v. Roff, 141 U. S. 661; 35 L. Ed. 893.

American Construction Co. v. Jacksonville, T. & K. W. Ry Co., 148 U. S. 372; 37 L. Ed. 486.

Kirwan v. Murphy, 170 U. S. 205; 42 L. Ed. 1009.

Ex parte National Enameling & Stamping Co., 201 U. S. 156; 50 L. Ed. 707.

Holko v. United States, 217 U. S. 423; 54 L. Ed. 821.

If the defendants could not appeal from the order on the motions they were of necessity required to await until a final judgment against them was entered before they could review or change this order. It would follow that if the course

plaintiff's counsel contends for is pursued that this court should issue the writ of certiorari, and in reviewing the proceedings reverse the case and remand it for a new trial. When a new trial was had the district court would, of necessity, have to follow the instruction given and enter a judgment against the defendants. The defendants would then take the case to the Circuit Court of Appeals and if that court then reversed the order and held that the defendant's motion should have been sustained, that the plaintiff's motion should have been overruled again the case would be reversed and sent back for retrial.

The Circuit Court of Appeals did not mistake the plaintiff's ground but it went to the gist of the question as to whether or not the statute of limitations was correctly applied by the trial court, because it would be a vain thing to go "round Robin Hood's barn" in such case. Not only did the Circuit Court of Appeals not misconceive the petitioner's contention, but it correctly interpreted his position but disapproved it and then applied correctly the rule of law as to the application of the statute of limitations in this case.

Before leaving this proposition we wish to call the attention of the court to a misstatement made under this proposition on p. 20 of the plaintiff's brief as to just what the court (Judge McPherson presiding) did. The only part of the plaintiff's motion to strike from the answer of the defendant anything with reference to the statute of limitations is in the 5th paragraph of the motion and is as follows:

"5. To strike out the words "is barred by the statute of limitations" in paragraph five (5) of said answers, because the same is redundant and irrelevant matter and states a legal conclusion and is inserted in said answers to the prejudice of the plaintiff." (See Pr. Rec. in Cir. Ct. of App. p. 83), and strikes the last seven words of the 5th paragraph of plaintiff's petition. The 5th paragraph of plaintiff's petition is as follows:

"That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and by his attorneys prior to the 22nd day of September, 1908, when

said action was commenced and prior to the first day of September, 1908, and that more than five years had elapsed after full knowledge by said plaintiff and his attorneys of all of the facts and alleged fraudulent representations, and since the plaintiff cut and destroyed said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of action set forth in the amended bill of complaint is barred by the statute of limitations." (See *Pr* |*R*|ec. in Cir. Ct. of Ap. pp. 76 and 77.) and which plea was by the trial court held to be a sufficient plea of the statute of limitations. (See plaintiff's original brief in the Cir. Ct. of App. p. 10). Hence counsel is mistaken when he states in his brief in support of the petition for the writ of certiorari that there was a motion sustained to "strike out the plea of the statute of limitations" nor is there any record which discloses that there was a ruling "refused" to permit such plea to be filed.

Fifth. The cases cited in support of the 5th proposition and also in support of the 4th proposition submitted by plaintiff do not sustain the positions there stated. The finding made by the court (Hon. W. H. Munger presiding), so far as it affects the present hearing was a determination of the following facts only, to-wit: In September, 1908, when the complainant filed his bill of complaint he was entitled to the relief he asked. Because of his own wrong doing in October and November, 1908, he precluded himself from securing the relief he had prayed for. It follows from this that by the commencement of his action to rescind and the prosecution of the same to an adverse finding he had elected his remedy and was estopped thereafter to pursue any other.

Sixth. This proposition is an attempt on the part of the plaintiff to come within a rule which is well settled—that where one mistakes his remedy and pursues the action to defeat it is not an election but in this case the plaintiff did not mistake his remedy. He had, at the time he commenced the suit, a right according to the finding to the particular remedy he prayed for but afterwards, not by accident, but intentionally and wrongfully did these things, (cut the timber), which deprived him of the right to the remedy he sought in the equit-

able action and then after having done those things he did not stop in the prosecution of his suit but insisted on the remedy he had selected and pursued the same until the court had found that at the time of the commencement of the action he was entitled to the relief he sought, but that by his own acts committed subsequently to the commencement of the action he had placed himself in such position that he was not entitled to the relief sought.

It should be borne in mind that the report of the master, his findings and recommendations were set aside and that then the court on the evidence returned, found as stated in plaintiff's petition for the writ of certiorari on p. 8, as follows: "The court finds that the complainant by his own voluntary act in cutting the timber from the Virginia lands received by him in exchange for the lands held in Nebraska—the amount of timber so cut consisted of at least some 1,400 logs—has, by such action, prevented the defendants being placed in *status quo* and such action being a ratification of the sale on the part of complainant." See order made on December 19, 1913, by the court, Hon. Wm. H. Munger, Judge, presiding. (Pr. Rec. Cir. Ct. of App. pp. 53, 54).

But should the master's findings be the ones upon which plaintiff would base his relief he still is in the same position because at the very time he made his election and started the action it laid wholly with himself as to whether or not he would refund the money paid to him by Renard or make excuse therefor and if he did make excuse therefor it was not a sufficient reason. If he did not make an excuse therefor the presumption is he had none.

Under this subdivision of plaintiff's argument he also presents this proposition that where a victim of a wrong has inconsistent remedies and he is doubtful which is the right one he may pursue any or all of them until he recovers through one. But in this case there is no doubt. In September, 1908, he could have recovered under either of the two remedies he had. It isn't a question of doubt. It is a case wherein the plaintiff fails because of his own wrongful act after he instituted his action. To go further it is certain that the cause of action set forth in the amended petition is not an amend-

ment of the cause of action set forth in the Bill of Complaint. It is a different cause of action filed more than four years after it arose and was discovered.

It is perhaps appropriate at this point to call attention to the theory upon which the decisions rest in a number of the cases cited by the plaintiff. There are cases where the facts or a portion of them are not within the knowledge of the plaintiff at the time he institutes his case. He pursues that action until he is defeated and in the defeat is brought to his attention the knowledge of all the facts, in which case the court has held that at the time he instituted the action he had no right to recover in that action, the language frequently used by the court being that he "did not have and never had" a right to the remedy sought. In other words there must have been at the time the action was instituted two inconsistent remedies which was true in the present case, but which was not true in the cases cited under this subdivision of plaintiff's argument. There is another class of cases which are usually bankruptcy cases where a person without knowledge of the facts or also ignorant of the law files an ordinary claim against the bankrupt's estate when he is entitled to one or the other of two remedies—to recover back his property or to be made a preferred creditor. But such cases are not in point in this case. As it is held in some of the cases cited a mistake of remedies is not an election between inconsistent remedies but the point wherein plaintiff's case fails is that it is not in this case a mistake of remedies, it is an election of inconsistent remedies. It is conceded by the defendants that where one mistakes his remedy that it does not constitute an election and the cases cited in support of that proposition on p. 23 of plaintiff's brief are not material in this controversy.

Seventh. Under the seventh subdivision of the argument plaintiff sets forth what is a principle recognized by some courts: An unsuccessful prosecution of a suit to rescind a contract of exchange of property on the ground of fraud does not constitute an election of remedies so as to defeat the plaintiff from suing for the value of his property. But plaintiff neglects to challenge the attention of the court to the fact that he is not suing for the value of his property. He is suing

for the difference between the actual value of the Virginia land, which formerly he did not own, and its represented value. He is not seeking to recover the value of the Knox County land at all, hence the case stated in his amended petition is not one falling under the cases cited under this proposition on p. 23 of his brief. And this brings us to a discussion of the case of *Cahoon v. Fisher*, 146 Ind. 583; 44 N. E. 667; rehearing 45 N. E. R. 787; 36 Law Rep. Ann. 193. The case of *Cahoon v. Fisher* is an exception to the rule adopted by this court and by the Circuit Court of Appeals. In the opinion, Justice McCabe says:

"The case that rules this case is *Neyswander vs. Lowman*, 124 Ind. 584. In that case, like this, the action was brought to rescind the contract for fraud. Afterwards the complaint was so amended as to make it a complaint to recover damages for fraud. The answer set up the original complaint as a conclusive election of remedies in bar of the amended complaint. But it was held that such an election to be a bar must have been prosecuted to judgment."

So that in the case relied upon by plaintiff it is conceded that where an action for rescission has been commenced and not abandoned before final judgment, but pursued to an adverse decision, that it is an election which concludes the party who instituted the action.

What is the conclusion to be drawn from this decision? It is not that the actions are not inconsistent—that they are identical. Quite the reverse. The Indiana cases assume that the actions are inconsistent, but that an election has not been made until the action to rescind has been prosecuted to a decree. The same court holds that when the action proceeds upon the theory which affirms the contract that there has been an election when the suit is instituted.

The portion of the opinion in *Cahoon vs. Fisher*, quoted on pages 15 and 16 of plaintiff's original brief in the Circuit Court of Appeals, clearly sets forth this rule.

The cases cited by the plaintiff on pages 14 and 15 of his original brief in the Circuit Court of Appeals and referred to on pages 30 and 32 of his brief in this court in support of

position, will be found to be against him or else cases holding that where one has mistaken his remedy, that is, brought an action which could not bring him any relief, it does not constitute an election of remedy.

The case of Jones vs. McGuinn 138 N. W. 686-687 is a case in which the petition apparently was framed with a double aspect and the plaintiff was required to elect as to which form of action he would pursue, the action to rescind or the action for deceit and he elected to pursue the action for deceit and it was held by the court that this would not defeat his recovery in the action for deceit.

Eighth. The proposition here presented is not supported by the authorities cited. They will require a reading to determine whether the plaintiff's contention is supported or not. It will be found that each case cited is distinguishable from the present case. However, if the rule in the Federal Courts and in the Nebraska Courts were as stated by the plaintiff still he must fail for the reason already stated—he did pursue his remedy to a decision adverse to his right to recover.

Ninth. *The order transferring the case from the equity to the law docket and directing amendment of the pleadings is not binding as to the identity of the cause of action stated in Bill of Complaint and in the Amended Petition.*

It is claimed under this subdivision that the order of the court (Hon. Wm. H. Munger presiding) transferring the case from equity to the law docket and directing an amendment of the pleadings is binding as to the identity of the cause of action stated in the bill of complaint and in the amended petition. The statement of that proposition ought to be its own refutation. If it is true as stated then if the plaintiff in his amended petition had alleged or set forth his action for a conversion of horses the order of William H. Munger transferring the cause of action would have been binding as to the identity of the causes of action. The court in making the order transferring the case from the equity side of the court to the law side of the court could no more determine in advance what the pleader would put in his petition than he could determine what will be in the petition in the next case which shall be

filed by an entire stranger. It was impossible for him to know or to suppose that the plaintiff would set up a cause of action which was inconsistent with the action he had already set forth in his bill of complaint and the cases cited in support of the proposition do not uphold any such doctrine or rule. The two cases cited from are the Supreme Court of Massachusetts. This state still adheres to the common law form of pleading but modified by statute. *Tracey vs. Boston & St. Ry. Co.* (90 N. E. 416) is placed upon a statute which vests the authority to permit amendments in the judicial discretion of the court and subject for review only when abused. The court refuses to review the question of identity of the causes of action and cites the statute in support of the position. The decision infers very plainly that the particular amendment to be made was presented and so the court advised as to what was in the amendment while in the present case there was no application made to amend, no amendment presented, no opportunity given the defendant to object to the amendment until after it was filed. The case of *Lowrie v. Castle et al.* (113 N. E. 206) carries out the idea above expressed and shows there was one cause of action it was stated in different forms in different counts.

Before leaving this subdivision the defendants again state that where the identity of the cause of action is retained an amendment may be made and although made after the bar of the statute would be complete it relates back to commencement of the action.

We also direct the attention of the court to the 5th subdivision of the opinion in *Lowrie v. Castle et al.* as to the proposition that the ruling of one judge as to the permission to amend even when made over the objection of the defendants did not deprive the defendants of the right to demur.

Tenth. It is conceded that in order that there may be an election of remedies there must be at the time of the election two inconsistent remedies; that if the law affords but one remedy and the plaintiff mistakes his remedy there can be no election and he may thereafter adopt the right remedy and pursue it to a conclusion. How stands the plaintiff measured by this rule? On September 22, 1908, when the plaintiff com-

menced this action he could have brought the action he did to rescind and, if he had not cut down the timber or the Virginia land in the following October and November, he would have been successful in such an action. This constituted one action or remedy and proceeds upon the assumption that the contract of exchange is void and is repudiated. At the same time he could have commenced the action for deceit and could have successfully maintained that action. The latter action furnishes another remedy and proceeds upon the theory that the contract is affirmed. These actions were open to the plaintiff on September 22, 1908. Nothing that has occurred since has changed anything with reference to conditions except the plaintiff's own acts in cutting the timber.

These actions are inconsistent for the reason already given and which need not be here repeated. The amended petition does not amend anything in the bill of complaint. The bill of complaint sought possession of specific real property. The amended petition seeks a money judgment. The plaintiff on September 22, 1908, had two inconsistent remedies, he selected one and pursued it to a final finding adverse to him, the adverse finding being because of his own act. The action set forth in his amended petition is barred because it was not commenced until the statute of limitations had run. It is as if the plaintiff had waited until September 25th, 1913, to commence his action and hence it is barred as he has shown by his bill of complaint that he knew all the facts in September, 1908.

Eleventh. The right to amend so long as the identity of the cause of action is retained is not questioned by the defendants. The case of *Cahoon v. Fisher*, *supra*, we have already discussed and shown that even under the rule there enunciated the plaintiff must fail. No case will be found going to the extent necessary to sustain the plaintiff in his position in this case. The cases cited by plaintiff on pages 26 to 30 do not announce a rule differing from that above stated. The plaintiff's difficulty is he is not prosecuting in the amended petition filed in September, 1913, the cause of action he stated in his Bill of Complaint filed in September, 1908. As suggested by the Circuit Court of Appeals it is not an amended petition. It sets forth a new action.

Twelfth. The position that the statute of limitations was stricken from the answer is not accurate as heretofore explained.

The motion for a new trial filed in this case does not refer to or allege as error striking out parts of the defendant's answer and whatever the error might have been it is not presented. (See motion for new trial, pp. 103 and 104 of Pr. Rec. in Cir. Ct. of App.) The reason the defendants' motion to strike the amended petitions were overruled is given in the order and is different from what is assumed by the plaintiff.

Thirteen. An amendment may be made and the cause of action more fully stated and if it is the same cause of action there is no bar of the statute of limitations but the plaintiff did not amend the cause of action stated in his bill of complaint. He stated an entirely different cause of action and he filed the pleading in which that new and different cause of action was stated more than four years after the discovery of the alleged fraud.

Fourteenth. *The Circuit Court of Appeals did not confuse "cause of action" with "remedy."*

It is the plaintiff that is confused as to his cause of action and remedies. Assuming the facts to be as alleged he has two causes of action arising out of the same state of facts or conditions, one on the contract for damages and one to rescind the contract. He elected to rely upon one of them and in so doing closed the door to the other. The only confusion is that which is with the plaintiff and that which would be created should the course he contends for be adopted. The two causes of action are based upon different courses to be pursued by the plaintiff. But even supposing the question—election of remedies was not in the case, the cause of action stated in the amended petition is first stated in September, 1913, more than four year after it arose and it is barred by the statute of limitations.

Fifteenth. It may be conceded that the prayer of the pleading may not be the test by which we determine as to whether it states a cause of action but when there is doubt as to what is the character of the action it does become a test as

to that question. This is true even though you may amend the prayer of the petition. The authorities cited by plaintiff in no way dispute or contradict the foregoing.

Sixteenth. It is conceded in this argument that this court will issue the writ of certiorari when there is necessity of avoiding conflict between two or more courts of appeal or between court of appeal and the court of the state, but in this case there is no such conflict. As we have pointed out, the decisions Whalen v. Gordon *supra*, and Schurmeir v. Conn. Mut. Ins. Co., *supra*, are by the same court and it has held there is no conflict and this decision is by the same court. We have also pointed out that the decisions of this court and the Supreme Court of Nebraska are in harmony with the decisions of the Circuit Court of Appeals citing the same cases cited by the plaintiff so far as they are on the questions here presented.

In closing, the defendants urge that the question is not of the importance to warrant the issuance of the writ. There is no conflict of decisions. There is no question of national moment. The decision is right. The writ should be denied.

Respectfully submitted,

W. D. FUNK and

R. E. EVANS,

Counsel for the Defendants.

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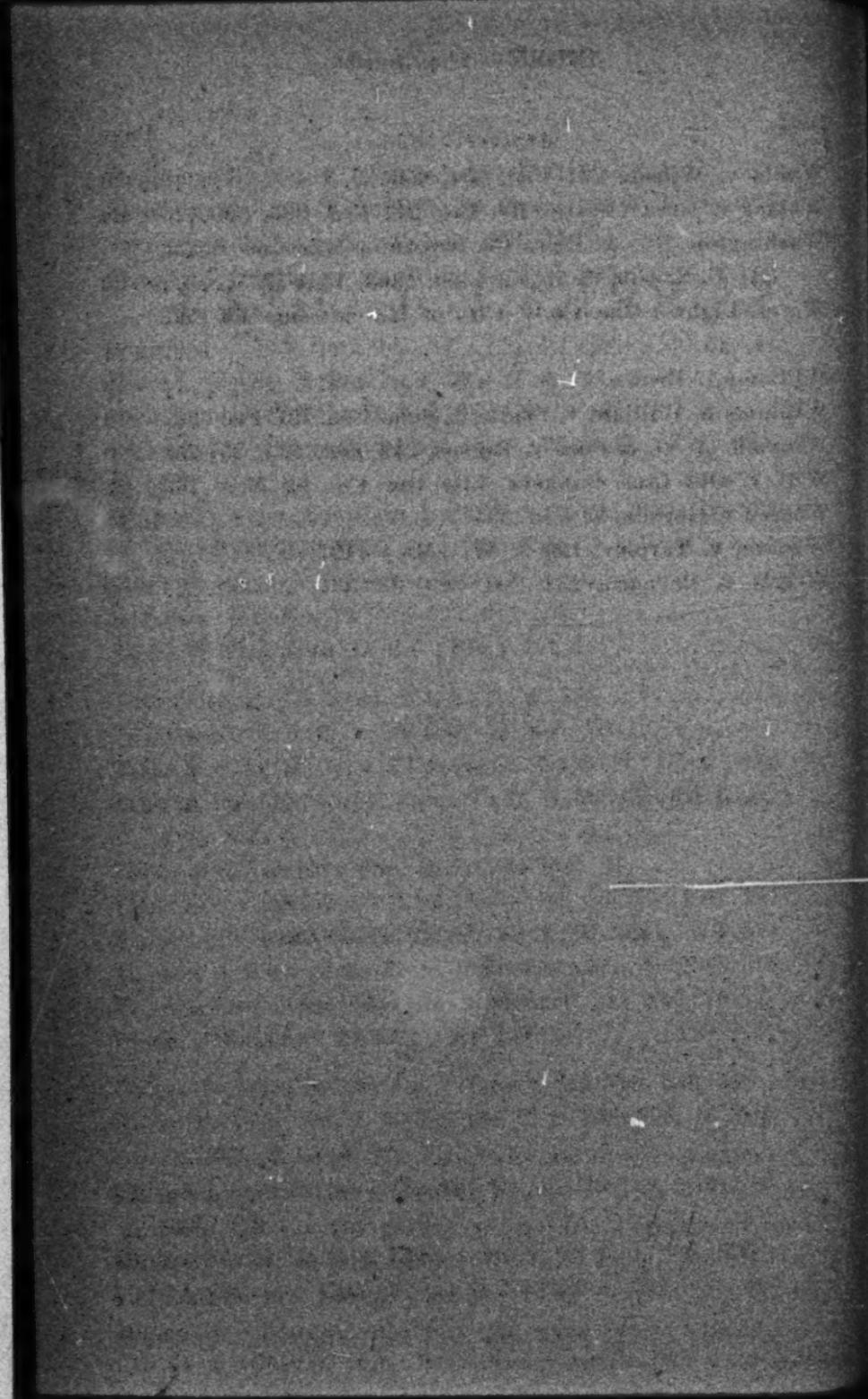
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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, A. D. 1916.

JOHN H. FRIEDERICHSEN, PETITIONER,

v.

**G. H. RENARD, AS EXECUTOR OF THE ESTATE OF
EDWARD RENARD, DECEASED, ET AL.,
RESPONDENTS.**

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

**WILLIAM V. ALLEN, Madison, Nebraska, Counsel for
Petitioner.**

Notwithstanding there is a quite full statement of the case in the petition for the writ of *certiorari*; in the findings of the master in chancery (Record, pp. 49-52); in the bill of exceptions (Record, pp. 85-105); and particularly in the stipulation contained in the bill of exceptions (Record, pp. 89-105), we have thought it would be acceptable to the court to restate the cardinal facts of the transaction. For convenience we will

speak of the petitioner John H. Friederichsen, as the plaintiff and of the respondents as the defendants.

1. *The Substantial Facts of the Case are as Follows:* September 22, 1908, the plaintiff filed his bill of complaint in the circuit court of the United States for the district of Nebraska, Norfolk division, against the defendant Edward Renard (now deceased), in his own right, and as agent for Mary C. Gilmore, and Mary C. Gilmore and W. J. Gilmore (Record, p. 1, fol. 1) for the purpose of obtaining the cancellation of a contract between the plaintiff and said defendants dated March 12, 1908, and a deed executed by him in pursuance thereof to the defendant Edward Renard (Record, pp. 91-96; folia. 96-102) dated March 19, 1908, conveying 240 acres of Knox county, Nebraska land described in the bill of complaint and in the amended petition and praying, among other things, that said contract and deed be declared null and void, and, "for such damages as your orator has sustained by reason of the frauds and misconduct of the defendants in the premises" (Record, p. 19, fol. 26, par. 5), and for general relief (Record, p. 19, fol. 26, par. 6), for the reason that the plaintiff had been induced by the false and fraudulent representations and professions of friendship of the defendant Edward Renard, the suppression of important material facts, cajolery and intimidation to enter into the contract and to execute the deed. It is averred in the bill of complaint (Record, p. 6, fol. 8), that the plaintiff was confined in an insane asylum from February 22, 1902, to September 27, 1902, and this is admitted in Renard's answer (Record, p. 23, fol. 32), and in defendants' amended and supplemental answers (Record, p. 121).

The defendants Edward Renard and Mary C. Gilmore answered the bill of complaint December 20, 1908 (Record, pp. 22-47) and on April 17, 1909 (Record, p. 48), the Honorable Isaac Powers, formerly an attorney general of Nebraska, was, by the agreement of the parties, appointed master pro hac vice to find and report the facts in the case to the court with his conclusions of law. The master heard the case beginning in

January, 1909, and ending in January, 1911 (defendants' brief, p. 4), and August 28, 1912, filed his report (Record, pp. 49-53), from which it appears, among other things, that as a part of the consideration for the sale and conveyance of his Knox county, Nebraska, land to the defendant Edward Renard, the plaintiff received a conveyance of the Louisa county, Virginia, land described in the bill of complaint and in the amended petition, nominally owned by the defendant Mary C. Gilmore (known in the record as Mary C. Flatt, Mary C. Gilmore, Clara Gilmore, Mary C. Hawthorne and Mary C. Gilmore Methven). It appears that the plaintiff and his family, consisting of his wife and nine children, went into the possession of the Virginia land July 1, 1908, at which time the deed therefor was delivered to him in the state of Virginia (Record, p. 95, lines 2, 3 and 4), (Master's report, p. 50, par. 6); that while in the possession of the Virginia land the plaintiff cut "1200 or 1400 logs" (Record, p. 54, fol. 59) which, however, were not used, removed or sold but remained on the premises.

The master further found that the sum of \$3050, which is the \$2500 mentioned in the contract by mistake (Record, p. 91, fol. 96), paid to the plaintiff by the defendant Renard in connection with the exchange of the land, had not been refunded or offered to be returned to the defendant Renard, and as a conclusion of law from these facts he found further that there could be no rescission or cancellation of the contract and deed, and he recommended a judgment in favor of the plaintiff for the sum of \$5880. It further appears that at the time the contract was made the plaintiff's Knox county, Nebraska, land was mortgaged to Renard for \$5000 and that the Citizens State Bank of Bloomsfield, Nebraska, of which Renard was president, held a second mortgage thereon in the sum of \$3045.69, which is the \$3050 above mentioned, which by mistake, as aforesaid, was stated in the contract to be \$2500.

It further appears from the master's report and from the contract (Record, p. 91, fol. 97), that the defendant Renard

was to pay the plaintiff \$70 per acre, or \$16,800 for his Knox county, Nebraska, land in this way: Renard was to assume, or to cancel, the \$5000 mortgage indebtedness held by him against the plaintiff's land, and to pay the plaintiff \$3000 in cash, and the plaintiff was to take Mrs. Gilmore's equity in the Virginia land for \$12,665, which totaled \$20,715, but this amount was to be reduced by \$4000, or to \$16,715 by the plaintiff giving Mrs. Gilmore a mortgage on the Virginia land in that sum and which he did, and which mortgage finally got into the hands of Jason C. Ayres of Dixon, Illinois, where Mrs. Gilmore at one time lived, the equity in which Virginia land the master finds was \$470 (Record, p. 50, par. 8). The plaintiff was unacquainted with the Virginia land, never having been in that state, and acted upon the representations and statements of Renard with reference thereto. The master found that the Virginia land was worth not to exceed \$15 per acre, or a total of \$4,470 (Record, p. 50, par. 5), while the bill of complaint avers that it was worth not to exceed \$5 per acre (Record, p. 7, fol. 10); and a witness, J. J. Porter, testified that the entire tract was worth from \$1500 to \$1800 (Record, p. 97, lines 8 and 9). That the defendant Renard committed a gross fraud upon the plaintiff is found by the master and practically conceded by the defendants in their brief. The plaintiff paid the \$3000 received from Renard in part payment of his Knox county land to discharge a second mortgage thereon (Record, p. 52, fol. 56), and the Virginia land was subsequently sold at foreclosure sale for the nonpayment of the \$4000 mortgage given thereon by the plaintiff to Mrs. Gilmore and was wholly lost to him (Record, p. 52, fol. 56, par. 14).

The defendants say on page 7 of their brief that: "Both the bill of complaint and the original (amended) petition allege the same facts as a basis for relief sought by each of them, except as to the allegation of damages," and on page 18 that: "The facts as to the fraud set forth in the amended petition were all in the bill of complaint which was filed September 22, 1908."

December 19, 1913, the court, the Honorable William H. Munger presiding, entered an order in which he set aside the master's report and directed *sua sponte* that the case be transferred under equity rule 22 to the law docket, "and that complainant and respondents file amended pleadings to conform with an action at law" (Record, pp. 53-54, fol. 58-59).

September 25, 1913, in compliance with said order, the plaintiff filed his amended petition pleading the identical facts and cause of action stated in the bill of complaint (Record, pp. 55-61). November 12, 1913, and December 17, 1913, the defendants Renard and Mary C. Gilmore respectively filed motions to strike the amended petition from the files (Record, pp. 61-64) in substance: (1) because by commencing the case in equity the plaintiff conclusively elected his remedy and became thereby estopped to pursue any other; (2) because the matters pleaded in the amended petition constitute a new and distinct cause of action from the one stated in the bill of complaint, and (3) because the cause of action stated in the amended petition was barred by the statute of limitations.

July 17, 1914, these respective motions were denied by the court, Honorable Smith McPherson presiding, and the defendants were ordered to answer to the merits of the amended petition and the case was set down for trial on September 21, 1914 (Record, pp. 64-65). August 26, 1914, the defendants Renard and Mary C. Gilmore filed their respective answers to the plaintiff's amended petition (Record, pp. 65-82) from which all of paragraph 1; all of paragraph 2 after the words "state of Virginia" in the fourth line thereof; all of paragraph 3 after the words "bill of complaint" in the seventh line thereof; all of paragraph 4; the words "is barred by the statute of limitations" in paragraph 5; all of paragraph 6; and the first five lines of paragraph 7 to the words "arguing the same," were, on the plaintiff's motion (Record, pp. 84-85) stricken out, and the case was set down for trial on the merits.

The effect of this order was to strike from said answers the collateral attack on the order of the court transferring the case from the equity to the law docket; the allegations that the plaintiff, by bringing the case in equity conclusively elected his remedy and the plea of the statute of limitations.

September 21, 1914, the defendants Renard and Mary C. Gilmore asked leave to withdraw their answers to the amended petition and to file a plea in abatement, which was denied by the court, Judge Page Morris presiding, the record reciting that: "The defendants Edward Renard and Mary C. Gilmore *** in open court, respectively ask oral permission of the court to withdraw their respective answers and file pleas in abatement instanter, setting up those things which had been stricken from the respective answers of said defendants to the amended petition on the motion of the plaintiff, which request upon the oral objection of counsel for the plaintiff was refused," to which ruling defendants excepted (Record, pp. 87-88, fol. 92). The case was then set down for trial on November 4, 1914, to which time the court adjourned (Record, p. 85).

When the case was called for trial November 4, 1914, Honorable Thomas C. Munger presiding, the defendants entered objections (Record, pp. 88-90) to the empaneling of the jury for the following reasons in substance: (1) Because the court had no jurisdiction or authority to transfer the case from the equity to the law docket and equity rule 22 did not apply; (2) because by commencing the action on the equity side of the court the plaintiff conclusively elected his remedy and the matters pleaded in the amended petition constituted a new and distinct cause of action; and (3) because the cause of action stated in the amended petition was barred by the statute of limitations. These objections were overruled and the case then proceeded to trial and some evidence and testimony were introduced by the plaintiff (Record, pp. 90-98) when the court, Honorable Thomas C. Munger presiding, suggested that the statute of limitations arose in the case and

that the parties might shorten the record by a stipulation; thereupon in compliance with the suggestion the stipulation appearing upon pages 98-102 of the record, was signed and filed. Particular reference is here made to the stipulation, as it settles many of the questions of fact in the case, and specifically refers to the bill of complaint as an exhibit.

The court adjourned to March 24, 1915, when it reconvened, sustained the defendants' objections to the introduction of any further testimony and directed a verdict for the defendants, upon which, after overruling the plaintiff's motion for a new trial, final judgment was entered dismissing the case at the plaintiff's costs, to which the plaintiff reserved an exception (Record, pp. 102-107). A writ of error was perfected to the circuit court of appeals and an opinion was filed March 25, 1916, affirming the judgment of the district court (Record pp. 138-141).

The assignments of error in the circuit court of appeals are to be found on pages 109-110 of the record. On the application of the plaintiff this court granted a writ of *certiorari* and the case is here for determination.

This brief is not to be regarded as superseding the one filed in support of the petition for the writ of *certiorari* which is mentioned herein as the original brief, but as a reply to the defendants' brief and to bring the citations to date and review some of the points made in their brief.

2. *Points Made in the Defendants' Brief.* Stripped of verbiage, the defendants' brief presents the following points:

- (a) That the writ of *certiorari* should not issue.
- (b) That the order of the court, Judge William H. Munger presiding, transferring the case from the equity to the law docket was without jurisdiction and void.

(c) That by the commencement of the case in a suit in equity the plaintiff conclusively elected his remedy and will not be permitted to amend and change from equity to law.

(d) That the amended petition states a new and independent cause of action from the one stated in the bill of complaint, and, having been filed more than four years after the commencement of the action, is barred by the statute of limitations.

(e) That having cut "some logs" from the Virginia land shortly after he went into possession thereof, the plaintiff became estopped from maintaining the case as a suit in equity, and four years having elapsed from the time of the commission of the fraud by the defendants before the plaintiff filed his amended petition, he has no cause of action either in equity or at law and can not recover.

3. *As to the Writ of Certiorari.* Much of the defendants' brief is devoted to discussing the advisability of the issuance of the writ of certiorari, but as it was issued, after an examination of the record, the point is not material. It would be presumption on my part to attempt to discuss the question of when this honorable court will or will not issue a writ of certiorari. Certiorari is an ancient common law writ in the nature of a writ of error, and the general rule seems to be that it will lie in all cases where no adequate remedy exists by which an erroneous determination will be reviewed, or excessive jurisdiction restrained. Under section 240 of the Judicial Code the power to issue the writ seems to be plenary.

4. *As to the Contention That the Order of the Court, Judge William H. Munger Presiding, Transferring the Case From the Equity to the Law Docket was Without Jurisdiction and Void.* This contention is not admissible for the following reasons:

(a) Under equity rules 22 and 23 it was the duty of the district court to transfer the case from the equity to the law

docket if properly triable as an action at law. *Edward Hines Lumber Co. v. Bowers*, 238 Fed. 782, 784; *Wright v. Bernard*, 233 Fed. 329, 330-331; *Waldo v. Wilson*, 231 Fed. 654, 656; *Collins v. Bradley Co.*, 227 Fed. 190, 201; *A. G. Winman & Sons v. Reeves*, 245 Fed. 253, 257-258; *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 225 Fed. 769, 772; *Gatewood v. New River Consol. Coal & Coke Co.*, 239 Fed. 65, 67; *United States v. Utah Power & Light Co.*, 208 Fed. 821; *Corsicana Nat'l Bank v. Johnson*, 218 Fed. 822, 822-824; *Illinois Surety Co. v. United States*, 212 Fed. 136, 139; *Cammack & Son v. Weimer*, 162 N. W. (In.) 586, 587; *Steinman v. Clinchfield Coal Corp.*, 93 S. E. (Va.) 684, 693. See also cases cited in paragraph 3, original brief. In Michigan equity rule 22 has been enacted into a statute. *Flint v. L. Heup*, 165 N. W. 626, 629.

(b) Notwithstanding the order of transfer, the district court retained jurisdiction whether the case is to be regarded as a suit in equity or an action at law. *Wright v. Bernard*, 233 Fed. 329, 331; *Goldschmidt Thermit Co. v. Primos Chemical Co.*, 225 Fed. 769, 773; *Linden Inv. Co. v. Honstain Bros. Co.*, 221 Fed. 178, 181; *Vosburg Co. v. Watts*, 221 Fed. 402, 408; *Goodman v. City of Ft. Collins*, 164 Fed. 670.

(c) The order is binding until "reversed, vacated or modified in an appellate or other direct proceeding instituted for that purpose." *Dryden v. Parrotte*, 61 Neb. 339, 340-341; *Parrotte v. Dryden*, 73 Neb. 201, 203; *Howell v. Ross*, 69 Neb. 1, 2; *In re Estate of Nelson*, 81 Neb. 363, 367. And the sufficiency of the petition is no test of the court's jurisdiction. *Ibid*; *Sporer v. McDermott*, 69 Neb. 533, 535. See also cases cited in paragraph 4, original brief. The order can not be attacked collaterally. *Shevalier v. Stephenson*, 92 Neb. 675, 680; 15 Ruling Case Law, p. 263, sec. 337. And an attack is collateral when not by appellate proceeding or in the manner prescribed by statute. *Baker v. Baker-Hoole & Company*, 1917 C. L. R. A. (N. S.) 171, 178.

(d) The district court, Judge William H. Munger presiding, denied the request of the defendants that the court find for and enter a decree dismissing the plaintiff's bill for want of equity (Record, p. 54, lines 22-24).

(e) The district court, Judge Smith McPherson presiding, denied the defendants' motions to strike the amended petition from the files because of an election of remedies, departure in pleading and the statute of limitations (Record, pp. 64-65).

(f) The district court, Judge Smith McPherson presiding, on the plaintiff's motion struck from the answers of the defendants all parts thereof assailing the legality of the order of transfer and averring an election of remedies, a departure in pleading and the statute of limitations.

(g) The district court, Judge Page Morris presiding, denied the request of the defendants to withdraw their answers and to file pleas in abatement assailing the validity of the order of transfer, setting up an election of remedies, a departure in pleading and the statute of limitations (Record, pp. 87-88, last par. on page 87 and 6 lines on page 88).

(h) The stipulation of parties shows, as is the fact, that each of these orders is in full force and effect and has never been questioned by motion to correct or by an appellate proceeding (Record, p. 102, lines 11-17).

5. As to the Contention That the Commencement of the Case as a Suit in Equity the Plaintiff Conclusively Elected His Remedy and Will Not be Permitted to Amend and Change From Equity to an Action at Law. This contention is inadmissible for the following reasons:

(a) The commencement of the case as a suit in equity brought into the litigation the entire transaction, or cause of action, so that, if for any reason the court could not order a rescission or a cancellation of the contract and deed, it could award the plaintiff damages in lieu thereof. *Lefcours v. Chamberlain*, 117 N. E. (Mass.) 327; *Stanford v. Stanford*,

101 Atl. (N. J.) 308; *State v. Nejin*, 74 So. (La.) 202; *Ferroc v. Forrest Inv. Co.*, 74 So. (Fla.) 216; *Szabo v. Spreckman*, 74 So. (Fla.) 411; *Cahill v. Town of Harrison*, 100 Atl. (N. J.) 625, 627; *Woolum v. Tarpley*, 196 S. W. (Mo.) 1127; *Real Estate Savings Institute v. Colonius*, 63 Mo. 295; *School District v. Holt*, 136 Am. St. Rep. 652; *McAllister v. St. Joseph Street Construction Co.*, 181 S. W. 58; *Blue Ridge Electric Co. v. American Bank Note Co.*, 237 Fed. 756, 759; *Cammack & Son v. Weimer*, 162 N. W. (Ia.) 586, 587; *United States v. Utah Power & Light Co.*, 208 Fed. 821; *Shrago v. Gulley*, 93 S. E. (N. C.) 458, 459; *Arnold v. Maxwell*, 111 N. E. (Mass.) 687; *American Stay Co. v. Delaney*, 97 N. E. (Mass.) 911. See also cases cited in paragraph 3, original brief. And in that case the defendants would be bound by the value they fixed on the plaintiff's property. *Boyce v. Ginnrich*, 134 S. W. (Mo.) 79, 81; *Houce v. Marlin*, 102 Pac. (Okla.) 128, 132-133; *Kley v. Hooley*, 127 N. Y. 297, 301; *Krumm v. Beach*, 96 N. Y. 398, 406-407; *Fisher v. Trumbauer, et al.*, 138 N. W. (Ia.) 528, 530.

(b) This so-called defense, with others, was presented by the defendants' motions (Record, pp. 61-64, folia. 69-72) to strike the plaintiff's amended petition from the files and was overruled (Record, p. 102).

(c) It was pleaded in paragraphs 1, 2, 3, 4, 6 and 7 of the answer of the defendant Renard (Record, pp. 65-68) and in like paragraphs of the answer of Mary C. Gilmore (Record, pp. 73-77) and was stricken out (Record, pp. 84-85) on motion of the plaintiff (Record, pp. 83-84).

(d) It was presented in the application of the defendants Renard and Mary C. Gilmore "to withdraw their respective answers and file pleas in abatement * * * setting up those things which had been stricken from the respective answers of said defendants to the amended petition on motion of the plaintiff * * *" (Record, pp. 87-88), which was denied.

(e) These orders are still in force and can not be collaterally attacked.

(f) Under the code system of practice a change of form from equity to law by an amended and substituted petition presenting a cause of action based on the same facts, without claim or basis for claim for equitable relief, is allowable. *Comack & Son v. Weimer*, 162 N. W. (Ia.) 586, 587; *McKeighan v. Hopkins*, 19 Neb. 33; *Kuhns v. Railway Co.*, 76 Ia. 67, 40 N. W. 92; *Smith v. Pacing Co.*, 56 Fed. 527; *George v. Reed*, 101 Mass. 378; *Sanger v. Newton*, 134 Mass. 308; *Lottman v. Barnett*, 62 Mo. 150; *United States Bank v. Lyon County*, 48 Fed. 632, 633; *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed. 1, 6-8; *Reynolds v. Missouri K. & T. R. Co.*, 117 N. E. (Mass.) 913, 914; *Smith v. Butler*, 176 Mass. 38, 42; 57 N. E. 322. And the question of jurisdiction settled on the equity side of the court can not be reopened as a matter of right after the case is transferred to the law side. *Reynolds v. Missouri K. & T. R. Co.*, 117 N. E. (Mass.) 913, 914; *Gahm v. Wallace*, 206 Mass. 39, 91 N. E. 1011. See also cases cited in paragraph 11, original brief.

(g) The supreme court of Nebraska goes to the extent of holding that: "Where a plaintiff has mistaken his remedy, but is apparently entitled to some relief, the cause will be remanded with directions to the trial court to permit a reformation of the issues." *Moseley v. Railway Co.*, 57 Neb. 636, 640; *McKeighan v. Hopkins*, 14 Neb. 361; *Malloy v. Malloy*, 35 Neb. 224; *Roberts v. Swearingen*, 8 Neb. 363; *Gregory v. Lancaster County Bank*, 16 Neb. 411.

(h) The transaction, namely the fraud, averred in the bill of complaint is the identical transaction or fraud averred in the amended petition (defendants' brief, pp. 7, 18). The transaction, or subject-matter being the same the pleading is amendable.

(i) The remedy invoked by the amended petition is not inconsistent with the remedy invoked by the bill of complaint,

but if it were the plaintiff would not be precluded in the absence of equitable estoppel. *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 548; *Rankin v. Tygard*, 198 Fed. 795, 806 and cases cited. Speaking on this subject it is said in 9 R. C. L., p. 961, sec. 7: "But the more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, and in which no element of estoppel *in pais* has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election." *Marcus v. National Council of K. & L. of Security*, 149 N. W. (Minn.) 197; *Brohman v. Anderson*, 178 Ill. App. 623; *Joseph Goldberg Iron Co. v. Cian. Iron & Steel Co.*, 154 S. W. (Ky.) 374; *Steinbach v. Murphy*, 128 S. W. (Mo.) 207; *Brigham v. T. D. Judy Inv. Co.*, 186 S. W. (Mo.) 15; *Williams v. Brown*, 74 S. E. (W. Va.) 409; *Olson v. Olson*, 168 Ill. App. 358; *Rosenbaum Bros. & Co. v. Dumm Commission Co.*, 176 Ill. App. 205; *Merle & H. Manufacturing Co. v. Hicks*, 178 Ill. App. 406; *Brodkey v. Lesser*, 157 S. W. (Tex.) 457.

(j) Paragraphs 1 and 2 of the bill of complaint (Record, p. 7), and paragraphs 5 and 6 of the prayer of the bill of complaint (Record, p. 10), form the basis for a recovery of damages in the absence of a decree of cancellation. The amount of the damages is a mere matter of calculation, and it has been held that if the essential elements of the plaintiff's case may be implied from the terms of the petition by reasonable intendment, they will be regarded as sufficiently alleged. *Sorenson v. Sorenson*, 68 Neb. 483, 489; *Kimmerly v. McMichael*, 83 Neb. 789, 792.

6. *As to the Contention That the Amended Petition States a New and Independent Cause of Action From the One Stated in the Bill of Complaint, and the Amended Petition Having Been Filed More Than Four Years After the Commencement of the Action is Barred by the Statute of Limitations.* This contention is not admissible for the following reasons:

(a) The cause of action stated in the amended petition is the identical cause of action stated in the bill of complaint.

This is admitted on page 7 of the defendants' brief in this language: "Both the bill of complaint and the original (amended) petition allege the same facts as a basis for relief sought by each of them, except as to the allegation of damages." And on page 18 in this language: "The facts as to fraud set forth in the amended petition were all in the bill of complaint which was filed on September 22, 1908."

(b) The statute of limitations is a defense and if not pleaded can not be proved. In this case it was stricken out and not reinstated. (Judge Carland's opinion, record, p. 139). It can not be raised by an objection to the introduction of evidence. *Pyle v. Park*, 196 S. W. 243, 246; *United Kansas Portland Cement Co. v. Harvey*, 216 Fed. 316, 317-318.

(c) The filing of the bill of complaint and the issuance and service of process thereon prevented the running of the statute of limitations as against the amended petition. Revised Statutes of Nebraska for 1913, sec. 7580, p. 2075; *McKeighan v. Hopkins*, 19 Neb. 33; *McCague Savings Bank v. Croft*, 87 Neb. 770; *Tecumseh National Bank v. McGee*, 61 Neb. 709; *Tomson v. Iowa State Traveling Men's Association*, 88 Neb. 399; *Davis v. Manning*, 97 Neb. 658, 660; *Butler v. Smith*, 84 Neb. 78; *Butler v. Smith*, 82 Neb. 763, 765; *Duffy v. Scheerger*, 91 Neb. 511; *Pebkin Plow Co. v. Wilson*, 66 Neb. 115, 118; *Cass v. Blood*, 71 Ia. 632; *McClintic-Marshall Const. Co. v. Foryg*, 246 Fed. 193, 199. See also cases cited in paragraph 11, original brief, pp. 25-30. And if the amended petition retains any part of the cause of action stated in the bill of complaint, it is sufficient to prevent the running of the statute of limitations after the bill was filed. *Texas & N. O. R. Co. v. Clippenger*, 106 S. W. (Tex.) 155, and cases cited.

7. *As to the Contention That Having Cut Some Logs From the Virginia Land the Plaintiff Became Estopped From Maintaining the Case in Equity, and Four Years Having Elapsed From the Time of the Commission of the Fraud by the Defendants Before the Plaintiff Filed His Amended Petition, He has*

no Cause of Action Either in Equity or at Law and Can Not Recover. This contention is not admissible for the following reasons:

(a) We have just shown that the commencement of the case in equity brought the entire transaction before the court and that the court had jurisdiction of the subject-matter, including the damages, at the time the pleadings were ordered to be amended.

(b) This question was not in issue April 17, 1909, when the case was referred to the master in chancery (Record, pp. 49-52), and August 20, 1912, when he made his final report (Record, p. 49), nor for four months and four days thereafter (Record, pp. 131-132, para. 5-7, defendants' amended and supplemental answers to the bill of complaint). In *Boisot v. Amarillo St. Ry. Co.*, 244 Fed. 838, 841, the court, by agreement of the parties referred the case to a master, and it is there said: "It is well settled that, where a master is appointed with the consent of all parties to hear evidence and report his findings of fact, such findings of fact are conclusive, unless unsupported by any legal evidence or contrary to all the evidence, and that only the master's conclusions of law, under the circumstances are reviewable on exceptions." *Hattiesburg Lumber Co. v. Herrick*, 212 Fed. 834, 129 C. C. A. 288. This rule, however, based on the prior consent of all parties, can not be extended to cover findings of fact on issues not at the time made by the pleadings." And it is held that a finding of fact not in issue is void. *Jarmine v. Swanson*, 83 Neb. 751, *et seq.*; *Building Improvement & Loan Ass'n v. Larkin*, 101 Atl. (N. J.) 1048; *Joyce v. Thompson*, 118 N. E. (Mass.) 184. And may be assailed collaterally. *Minnesota Threshing Manf. Co. v. L'Heureux*, 82 Neb. 692, 695; *George v. Dill*, 83 Neb. 825; *Rudil v. Sawyer*, 85 Neb. 235, 238.

(c) "The action after the amendment was simply a continuation of the original action with a claim for different relief." *Case v. Blood*, 33 N. W. (In.) 144, 146.

8. *The Commencement and Unsuccessful Prosecution of an Action to Cancel or Rescind a Contract for Fraud Does Not Estop the Plaintiff From Prosecuting an Action for Damages Growing Out of the Same Transaction.* The consensus of judicial opinion is that an unsuccessful prosecution of a suit to cancel or rescind a contract for exchange of property on the ground of fraud, does not constitute an election of remedies so as to defeat the plaintiff from suing for the value of his property or to recover damages for the fraud. *Cahoon v. Fisher*, 36 L. R. A. 193, 195; *Jones v. Magoon, et al.*, 138 N. W. (Minn.) 686, 687; *Freeman v. Fehr*, 157 N. W. (Minn.) 587, 588; *Dooly v. Crabtree*, 109 N. W. (Ia.) 889, 890; *International Realty & Sureties Co. v. Vanderpoel*, 148 N. W. (Minn.) 811, 812; *Bornsdall v. Waltomeier*, 142 Fed. 415, 420; *Powers v. Benedict*, 88 N. Y. 605; *Equitable Co-operation Foundry Co. v. Horsee*, 33 Hun. (N. Y.) 169; affirmed in 103 N. Y. 25; *In re Van Norman*, 43 N. W. (Minn.) 334, 335; *Marshall v. Gilman*, 53 N. W. (Minn.) 811, 812; *In re Recoveryship of Washington Bank*, 75 N. W. (Minn.) 727, 729; *Thorar & Cassady Co. v. Baker*, 77 N. W. (Ia.) 510, 511; *Fuller-Warren Co. v. Harter*, 85 N. W. (Wis.) 698, 699, *et seq.*; *Clausen v. Head*, 85 N. W. (Wis.) 1028, 1029-1030; *In re Pederson's Estate*, 106 N. W. (Minn.) 958, 959, *et seq.*; *Lemon v. Sigourney Savings Bank*, 108 N. W. (Ia.) 104, 107; *Holmes v. Smith*, 112 N. W. (Mich.) 912, 913; *Bandy v. Cates*, 97 S. W. (Tex.) 710, 711.

9. *Review of Cases Cited by Defendants in Their Brief and by Judge Carland in his Opinion.* The defendants in their brief and Judge Carland in his opinion cite *Whalen v. Gordon*, 95 Fed. 365. Eliminating what Judge Sanborn there says *ergoendo*, that case may be reduced to a sentence. Gordon and others first brought an action in a Dakota court, in which there was no service, against Whalen and others for a breach of warranty and a cancellation of promissory notes given as part of the purchase money for a horse. Subsequently they brought an action for damages for a breach of warranty in an Iowa federal court, and after the statute of limitations had run against the first action, amended their petition "so as to

seek to recover as upon a rescission of the contract of purchase the price paid by them for said horse," and it was held that the statute of limitations had run against the latter by reason of its elimination in the process of amendment. In each instance Whalen and others affirmed the validity of the contract. In directing a verdict for the defendant in this case Judge Thomas C. Munger dissented from the *Whalen case* but felt compelled to follow it. (Memorandum opinion, first brief circuit court of appeals, p. 11.) *Schurmeier v. Connecticut Mut. Life Ins. Co.*, 171 Fed. 1, 8, is in direct conflict with the *Whalen case* and has a history. It first appears in 124 Fed. 865, 866, where the judgment of the court below was reversed and the case was remanded with leave " * * * to amend its complaint stating its cause of action at law or in equity as it may be advised * * *." It is then reported in 137 Fed. 42-48 in which the right of amendment was again recognized and it was again remanded. It is next reported in 171 Fed. 1-18, in which Judge Hook delivered the opinion, Judges Sanborn and Philips being associated with him. In speaking of an amended petition relating back to the commencement of the action so as to prevent the bar of the statute of limitations, Judge Hook says (p. 7) :

There remains for consideration the transfer of the cause from the law to the equity side of the court and the recasting of the pleadings after the eighteen months had run. The court already had jurisdiction of the subject-matter of the controversy and of the parties. By this we mean jurisdiction in its general sense, and have in mind the fundamental grounds prescribed by congress, the absence of which can not be waived or cured by consent or stipulation of the parties. If such grounds exist when an action is begun, though they are not shown in the record, a circuit court nevertheless lawfully acquires cognizance of the cause, and may allow an amendment supplying the necessary averments. This may be done after a judgment has been reversed by an appellate court because of the apparent lack of jurisdiction, and after the period prescribed by a statute of limitations has fully run and the action if commenced anew could not be maintained. *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed.

209, 16 C. C. A. 498; *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248. Such amendments do not introduce a new cause of action, and, as they simply bring upon the record facts existing when the action was begun, they relate back to that time. A circuit court of the United States exercises jurisdiction both at law and in equity, and while the distinction is important and is carefully preserved, we do not think that if a party misconceives his remedy the court is powerless in aid of justice to direct a transfer of the cause to the proper docket, and thereafter, with appropriate changes as to form, to allow it to proceed as though originally lodged there. An order to that effect is no more radical than one permitting an amendment showing for the first time fundamental statutory grounds for invoking the jurisdiction of the court for any purpose; and, as we have seen, the practice of granting orders of the latter character has been approved. It not infrequently happens that an action involving both legal and equitable rights and remedies is removed to a circuit court of the United States from a court of a state in which the statutes provide simply for a civil action without distinction between law and equity, and that difficult questions arise in the circuit court as to the proper docketing and disposition of the case. It would be a harsh rule that an error of judgment in such matter rendered proceedings on the wrong side of the court wholly void, and that the statutes of limitation continued to run as though no action were pending. In this respect there is no difference between a cause removed to a circuit court and one originally begun there. If the requisite diversity of citizenship exists or a federal question is involved, and the prescribed amount or value is in controversy, the cause is pending in the circuit court, and an error committed by entertaining it on the wrong docket is an error in the exercise of jurisdiction which the court has power to correct. Broad powers of amendment of process, pleadings, orders, and judgments are conferred by act of congress, and should be liberally exercised in the interest of justice. We commonly speak of a court of law and a court of equity as though they were separate and distinct tribunals, but a circuit court with its dual jurisdiction is but a single court, and its material constitution is the same when it sits today in the trial of an action at law and tomorrow in hearing a suit in equity.

Judge Sanborn dissented, saying, among other things, that Judge Hook's opinion "conflicts with the decisions of the supreme court in * * * *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 290, 298, 15 Sup. Ct. 877, 39 L. ed. 983, and with the decisions of this court in *Schmurmeyer v. Connecticut Mutual Life Ins. Co.*, 137 Fed. 42, 47, 29 C. C. A. 22, 27, and *Whalen v. Gordon*, 95 Fed. 305, 309, 37 C. C. A. 70, 74." However, the language of Judge Sanborn in *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 45, in which Adams and Phillips sat with him, is convincing that he had receded from the *Whalen case*; and this is true of the case *Rankin v. Tygard*, 198 Fed. 795, 806, in which he delivered the opinion and Hook and Willard were associated with him, and *Union Central Life Ins. Co. v. Drake*, 214 Fed. 536, 548, in which he wrote the opinion and Judges Hook and Pope were associated with him. So also the *Whalen case* is in conflict with *Bogart v. Southern Pac. Co.*, 244 Fed. 61, 62, from another circuit, in which it is said: "A fruitless attempt to recover by an unavailable remedy can not deprive one of his rights properly recoverable by a different and appropriate remedy. *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; *Barnsdall v. Waltomeyer*, 142 Fed. 415, 420, 73 C. C. A. 515." By strong inference the *Whalen case* is disapproved by Judge Carland, with whom Judges Munger and Youmans were associated, in *Bankers' Surety Co. v. Town of Holly*, 219 Fed. 96, 102-103, and also in *Williams v. William B. Sculfe & Sons Co.*, 227 Fed. 922, et seq.; *McDonald v. State of Nebraska*, 191 Fed. 171, 177; *Goodman v. City of Fort Collins*, 164 Fed. 970, 972-973.

In *Union Pacific Ry. Co. v. Wyler*, 154 U. S. 285-298, 39 L. ed. 983, 991, cited in the defendants' brief and by Judge Carland in his opinion, the action was based upon common law negligence, while the amended petition changed the action to a Kansas statute which gave an employee a right of action against the railroad company in derogation of the common law right, and prescribed two years within which the right was to

be enforced. It was held that the limitation allowed for the enforcement of the new right was not a statute of limitations, but a statute of liability and a constituent element of the action itself, and did not relate to the remedy. That question is not involved in this case. The *Wyler* case is based upon the familiar doctrine that where a statute confers a right which does not exist at common law and by its terms is enforceable by an action only within a given time, the time thus allowed is a constituent element of the liability intended to be created and of the right intended to be conferred. *Madden v. Lancaster County*, 65 Fed. 188; *Therroux v. Northern Pacific R. Co.*, 64 Fed. 84; *Railroad C. v. Hine*, 25 O. St. 629, 634-635. Doubtless, however, the tendency of the late cases is to depart from the strict letter of the *Wyler* case. In *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593-608, 36 L. ed. 829, 933, it is held proper to amend a petition if the amendment pertains to the same "transaction" and this is recognized in the following cases: *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570-578, 57 L. ed. 355, 362-364; *St. Louis, Iron Mountain & So. Ry. Co. v. Hesterly*, 228 U. S. 702-705, 57 L. ed. 1031-1033; *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290-295, 60 L. ed. 1006, 1009; *Atlantic & Pacific Ry. Co. v. Laird*, 164 U. S. 393-403, 41 L. ed. 485, 488; *Washington Railway & Elec. Co. v. Ann Catherine Scala*, 344 U. S. 630, 61 L. ed. 1360, 1363, 1364-1365; *Galesburg K. & Elec. Co. v. Hart*, 221 Fed. 7, 12-13, in which both the *Wyler* and *Whalen* cases are distinguished from the *Cox* case and the latter is followed; *Collins v. People's Power Co.*, 223 Fed. 47, 48, 49, in which Judge Garland refused to follow the *Wyler* case. The departure is also recognized in *In re Louisell Lumber Co.*, 209 Fed. 784, 787; *Walker v. Iowa Central Ry. Co.*, 241 Fed. 395, 399; *Keystone Coal & Coke Co. v. Fekete*, 132 Fed. 72, 75; *L. & W. R. Co. v. Yurkonis*, 220 Fed. 429, 433; *Hobart v. Illinois Central R. Co.*, 81 Fed. 5, 6, 7; *Mutual Life Ins. Co. of New York v. Dingley*, 100 Fed. 408, 411, et seq.; *Southern Ry. Co. v. Simpson*, 131 Fed. 705, 711; *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 680, 697; *Lucchetti v. Philadelphia & R. Ry. Co.*, 233 Fed. 137,

138; *Bankers Surety Co. v. Town of Holly*, 219 Fed. 96, 103; *Illinois Surety Co. v. United States*, 215 Fed. 334, 339; *Crockett v. Miller*, 112 Fed. 729, 735-737.

Robb v. Voss, 155 U. S. 13-45, 39 L. ed. 52, cited in defendants' brief and in Judge Carland's opinion, is not in point because the rights of "an innocent third party" are not involved and the case is based on the doctrine of equitable estoppel. See original brief, p. 33. *Stuart v. Hayden*, 72 Fed. 402, 411, cited in defendants' brief and in Judge Carland's opinion is simply to the effect that where a party has two inconsistent remedies the final election to pursue one waives the other. But here the remedies are not inconsistent. Each assails the transaction as fraudulent. But that case was brought to this court, 169 U. S. 1-15, 42 L. ed. 639; 170 U. S. 702, 42 L. ed. 1204, and as finally disposed of is destroyed as authority. It is criticised in *McDonald v. Decey*, 134 Fed. 528, 532, and is repudiated in *Water, Light & Gas Co. v. City of Hutchinson*, 160 Fed. 41, 45.

The cases of *First National Bank of Chadron v. McKinney*, 47 Neb. 149, 151, 152; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434, 440; *Pollock v. Smith*, 49 Neb. 864, 868; *First National Bank of Chadron v. Tootle*, 59 Neb. 44, 46, 48, and *Boggs v. Young*, 81 Neb. 621, 624, cited in defendants' brief and in Judge Carland's opinion, are cases involving equitable estoppel. If not so regarded, they are in direct conflict with the opinion of the supreme court of Nebraska in *Commercial National Bank of Kearney v. Faser*, 99 Neb. 105, 108, where it is said: "A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction thereon, will not deprive him of a right to which he is properly entitled," and in direct conflict with the following Nebraska cases in which it is held that if the amended petition pertains to the same "transaction" the case may be amended from law to equity or equity to law and the statute of limitations will not intervene. *McKeighan v. Hopkins*, 19 Neb. 33, 35; *Carmichael v. Dolen*, 23 Neb. 335,

338; *Schuyler National Bank v. Bollong*, 28 Neb. 684, 693; *Homan v. Hellman*, 35 Neb. 414, 416; *Scroggin v. Johnston*, 45 Neb. 714, 719; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100; *Butler v. Bruce & Company*, 75 Neb. 322, 325; *Johnson v. American Smelting & Refining Co.*, 80 Neb. 250, 253; *Railway Co. v. Young*, 67 Neb. 568, 570; *Witt v. Old Line Bankers Life Ins. Co.*, 92 Neb. 763; *Brockman v. Lincoln & N. W. Ry. Co.*, 85 Neb. 228, 231; *Stone v. Snell*, 96 Neb. 581-583; *Moss v. Marks*, 70 Neb. 701, 702-704; *Morrison v. Gosnell*, 84 Neb. 275, 277. They are also in conflict with, *Kuhns v. Wisconsin I. & N. Ry. Co.*, 40 N. W. (Ia.) 92, 93; *McDonald v. State of Nebraska*, 101 Fed. 171, 177; *Hardin v. Boyd*, 113 U. S. 756-768, 28 L. Ed. 1141, 1142; *French v. Stewart*, 89 U. S. 238-250, 22 L. ed. 854, 856; *Cockshot's Lessee v. Hopkins*, 2 Dal. (U. S.) 97, 1 L. ed. 305; *Tyson v. Belmont*, 24 Fed. Cas. 14305a; *Bailey v. Lantz*, 3 Tex. Civ. App. 529; *Rohrbach v. Hammill*, 143 N. W. (Ia.) 872, 873-874; *Roberdeau v. Bierkamp*, 142 N. W. (Ia.) 217, 219; *Taft v. Stow*, 174 Mass. 171, 54 N. E. 506; *Seattle, Etc. R. Co. v. Union Trust Co.*, 79 Fed. 179; *Loaky v. Haworth*, 141 Fed. 850; *Hodges v. Kimball*, 91 Fed. 845; *Great Western Coal Co. v. Chicago, Great Western Ry. Co.*, 98 Fed. 274, 279; *Patillo v. Allen-West Com. Co.*, 131 Fed. 690, 693; *Thompson v. Automatic Fire Protection Co.*, 151 Fed. 945; *Goodman v. City of Fort Collins*, 164 Fed. 970. *Rusk v. Norman*, 199 S. W. (Mo.) 721, 722, is a case of rescission reversed and remanded for the express purpose of permitting an amendment to recover damages.

In a note to *Missouri K. & T. R. Co. v. Bagley*, 3 L. R. A. (N. S.) 259, 288, it is said: "It is the general view that changes from law to equity, and from equity to law, work no change in the cause of action when the fundamental facts of the controversy remain identical." And in *Goodman v. City of Ft. Collins*, 164 Fed. 970, it is said in the syllabus: "When respondents have been brought under the jurisdiction of the court by proper service of process, the jurisdiction over them is not lost by an amendment of the complaint whereby a necessary jurisdictional allegation is inserted in it. The amend-

ment is not the institution of a new proceeding, and creates no occasion for the issuance of a new summons or like process. A judgment is not open to collateral attack merely because there may have been an abuse of discretion in the exercise of a lawful power to allow amendments to the complaint, for at most that would be a mere error and would not render the judgment void." See also the following cases: *Bordeaux v. Tucson Gas, Elec. Light & Power Co.*, 114 Pac. 547, 33 L. R. A. (N. S.) 196; *Truckee River Gen. Elec. Co. v. Benner*, 211 Fed. 79; *Russell v. Chicago, R. I. & P. Ry. Co.*, 141 N. W. (Ia.) 1077; *Brown v. Detroit United Ry.*, 146 N. W. (Mich.) 278; *Central of Georgia Ry. Co. v. Sturgis*, 48 So. 810; *Anderson v. Ahleson*, 110 N. W. (Ia.) 335, 341; *Burns v. Schreiber*, 51 N. W. (Minn.) 120; *City of Detroit v. Hoerner*, 85 N. W. (Mich.) 1.

10. *The Plaintiff Wrongfully Denied the Right of Trial and Recovery.* Notwithstanding defendants say in their brief (p. 19), that the plaintiff has had a trial on the merits of the case, the fact is otherwise. The case was tried to the master who found for the plaintiff and recommended a judgment in his favor for \$5880.00, but the finding was set aside and the pleadings reformed; and when the case came on for trial to the jury a verdict was directed against the plaintiff because of the statute of limitations. It would seem idle, under such circumstances, to claim that there had been a trial on the merits. Through the fraud of the defendants the plaintiff lost his valuable Knox county, Nebraska, land. He has never been compensated in any way for the damages thus sustained. Without protracting this brief, it would seem that the judgment of the district court and of the circuit court of appeals ought to be reversed and the case remanded for a new trial.

Respectfully submitted,

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, A. D. 1918

JOHN H. FRIEDERICHSEN, PETITIONER,

vs.

**G. H. BENARD, AS EXECUTOR OF THE ESTATE OF
EDWARD BENARD, DECEASED, ET. AL., RE-
SPONDENTS.**

**DEFENDANT'S BRIEF, ANSWERING PETITIONER'S CASE
MADE IN BOTH PARTIES. *130-145***

William V. Allen, Counsel for Petitioner.

W. D. Fuak and R. E. Evans, Counsel for Defendants.

STATEMENT OF CASE.

There has been filed in this case by the petitioner with and in support of his petition for the writ of certiorari, a brief and argument, and on March 1, 1918, there was served on the respondent what is termed "Reply Brief of Petitioner." The latter again argues the case in its entirety and the respondent is presenting this brief in answer to both and intends to cover the entire case of the defendants.

The original bill of complaint sought rescission of a contract of exchange of land made between the plaintiff and the defendant, Mary C. Gilmore, by the defendant, Edward Renard as her agent, the grounds upon which the rescission was asked being the alleged misrepresentation and fraud of the defendant, Renard, by which the contract was induced. The concluding paragraph of the bill and the prayer to the bill are as follows:

"That your complainant is now in want and is absolutely ruined by reason of the frauds and circumstances heretofore narrated and set out.

"All of which acts, doings and pretenses of said defendants, and each and every one of them, are contrary to equity and good conscience and tend to the manifest wrong, injur and oppression and ruin of your orator in the premises. In tender consideration whereof, and for as much as your orator is entirely remedyless by the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, make a full disclosure and discovery of all matters heretofore stated and charged (but not under oath, an answer under oath being hereby expressly waives) that this complainant says he stands ready and willing to do right and equity in the premises, and as doing so, hold the said Virginia lands, which have been conveyed to him as aforesaid, subject to such orders of this Honorable Court as to it shall seem right and equitable and is willing and ready to convey and deliver back the same to the grantees, or to any one whom the court shall direct, and for such purpose will produce a conveyance to the same in open court whenever this Honorable Court shall so order;" and prays

"First. That a full and complete disclosure be had from Edward Renard, Mary C. Gilmore and W. J. Gilmore, setting forth all and every transaction and dealing of each and every of said defendants with respect to the said false and fraudulent exchange and trade of properties aforesaid—showing each and every act and transaction in detail.

Second. That the said contract of March 12th, 1908, between your orator and wife and the defendants *agreeing to the exchange of properties, be declared and decreed fraudulent, null and void and of no force, effect or virtue.*

Third. That the aforesaid deed from your orator and wife to Edward Renard, dated March 19th, 1908, *conveying the said 240 acres of Knox County, Nebraska, lands, be declared and decreed null and void, of no force and virtue and that the same be cancelled and set aside as fraudulent.*

Fourth. If necessary, that such reconveyances be directed and had as to the Court may seem just, equitable and proper and your orator again invested with the Knox County, Nebraska, lands of which he has been fraudulently divested.

Fifth. That a decree be rendered against each and every of said defendants in favor of your orator for such damages as your orator has sustained by reason of the frauds and misconduct of said defendants in the premises, which amount will be ascertained by referring the matter to one of the Commissioners of this court or by an issue out of chancery to be tried at the bar of this court, or as directed, and that all proper account be taken and had and all proper disclosures made.

Sixth. That all such other, further and general relief may be decreed your orator as the nature of his case may require and to this Honorable Court may seem meet and proper.

Seventh. And may it please your honors to grant unto your orator a writ of subpoena of the United States of America, directed to the defendants, Edward Renard, in his own right and as agent for Mary C. Gilmore and W. J. Gilmore, Mary C. Gilmore and W. C. Gilmore, commanding them and each of them, on a day certain, to appear and answer this bill of complaint, and to abide by and perform such order and decree as to this court shall seem proper, and required by the principles of equity and good conscience, and your orator will ever pray, etc." (See Pr. Rec. pp. 18 to 20.)

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The defendants denied the facts alleged in the bill of complaint as to any fraud or misrepresentation, as to the incapacity of the complainant, the confidential relations, or that the complainant was in any way scared by the defendant Renard either directly or indirectly, in fact denies all improper acts alleged in the complaint.

The land formerly owned by the plaintiff is situated in Knox County, Nebraska. The land formerly owned by the defendant, Mary C. Gilmore is situated in Louisa county, Virginia.

It is not a fact nor was it alleged in any pleading of the plaintiff, as stated in paragraph 4 on page 3 of plaintiff's petition for writ of certiorari, nor was it in evidence that Edward Renard had possession and control of the Virginia land and authority to appropriate the proceeds from its sale to his own use and benefit.

It is not averred in the bill of complaint, as stated in paragraph 6 of the petition for the writ of certiorari, that your petitioner sustained damages by reason of the difference in value of the said respective tracts of land in the sum of \$13,345.00. The only place such an allegation appears is in the amended petition filed on September 25, 1913, after the transfer of the case to the law side of the court.

It is not a fact, as alleged in paragraph 16 of the petition for the writ of certiorari, that the decision of the circuit court of appeals is in conflict with other decisions of this honorable court and with the decisions of the Supreme Court of Nebraska. Nor is the decision in conflict with any decision of either of said courts.

The original bill of complaint was filed in this case on September 22, 1908; the answers were filed on December 29th, 1908; the replication was filed thereafter.

There are in the petitioner's arguments statements to the effect that the original bill of complaints sought a recovery of damages for the alleged fraud of the defendant.

That the damages so sought to be recovered were the same as those set forth in the so-called amended petition. In this the petitioner is mistaken.

All the allegations in the bill of complaint which relate to or set forth damages are as follows: "That the complainant wishes to show further to this Honorable Court the following facts:

"That by virtue of the public auction of his effects before leaving Nebraska to come to Virginia, he suffered a large loss, the sale amounting to nearly \$3000.00 and his effects going at the lowest estimate, at 25 per cent beneath their real valuation—the buyers knowing that he was obliged to sell the same. That his (freight) bill and expenses of moving to Virginia amounted to something like \$1,000.00 and that he has, in trying to work an almost worthless property in Virginia shoved off on him as above set forth, he has expended in improvements, machinery and labor in the neighborhood of \$3000.00, which sum is almost an absolute loss to him, as the machinery purchased is of no use to him and the land, under the best cultivation complainant could give it, does not yield a profit. That the above and many other expenses have been incurred, and expenditures made by your complainant, each and every one on account of the fraud of Edward Renard, Mary C. Gilmore and W. J. Gilmore, and from which complainant will derive no benefit or advantage. That complainant left on his 240-acre place, 8 acres of alfalfa, 5 acres of timothy and clover hay, 8 acres of broom grass and 30 acres of (prairie) hay from all of which the said Edward Renard, Mary C. Gilmore and W. J. Gilmore have derived advantage and profit. That his lands were ready for spring crops with the exception of the oat stubble which was not plowed—that there were two new cattle yards left on the premises and that the place is now being rented for a rental of \$600.00 a year, and as your complainant is informed, for the period of five years." (Pr. Rec. pp. 17 and 18.)

No other allegations as to damage will be found in the bill of complaint. The allegations relate alone to damage incidental to the moving from Knox County, Nebraska to Louisa County, Virginia, and if true and established would not be elements of damage to be considered by the Court under the case made by the "amended petition."

On April 2nd, 1909, an amendment was filed to each of the answers of the defendants, Renard and Gilmore, setting up that during the months of October and November, 1908, and after plaintiff had knowledge of the said conditions and facts surrounding said transaction complained of in the bill of complaint and had full knowledge of the value, situation

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and surroundings of the real estate in Virginia involved in the action and after he had full knowledge of the truth and falsity of each and all of the misrepresentations set forth in his bill of complaint and after he had filed his bill of complaint in this action, from said real estate in Virginia, the complainant, his agents and servants, at his request, cut not less than 1,400 logs which at the time of said trade and at the time of the filing of complainant's bill of complaint was standing and growing timber upon said farm in Louisa County, Virginia, and of the reasonable value of \$1,400.00 and that during the year 1909 and after the complainant had full knowledge of all the conditions, circumstances and facts surrounding the transaction complained of in the bill of complaint and full knowledge of the truth or falsity of each and all of the misrepresentations and after this action was commenced, the complainant permitted the trust deed which he and his wife had given to secure the sum of \$4000.00 and which deed conveyed the real estate in Louisa County, Virginia, to be foreclosed and said real estate to be sold to Jason Ayres, the owner of said trust deed and indebtedness. The matters so set forth in the amendments were incorporated in and made a part of amended and supplemental answers filed in this case by the defendants, by leave of court, on the 31st day of July, 1911. The holder of the trust deed enjoined the removal of the logs so cut and because of the waste so committed instituted the action to foreclose, which resulted in the above mentioned sale.

In January, 1909, on notice, testimony on behalf of the complainant was taken in Louisa County, Virginia. Again in November, 1909, on notice, the depositions of some of the same witnesses were retaken. On April 17th, 1909, Hon. Isaac Powers, of Norfolk, Nebraska, was appointed master in chancery to make a finding of facts and report the same and his conclusions of law thereon. In November, 1910, the master took evidence at Louisa, Virginia of some of the same witnesses taken in the depositions of January, 1909, and November, 1909. The complainant continued to take evidence until the 14th of March, 1911, when a "rest" was announced. The defendants in June of 1911 took all their evidence. The last witness called and sworn in the case was the one called and sworn in behalf of the complainant's main case.

The parties, complainant and defendant, having submitted all of their evidence, and after arguments by counsel for both parties, submitted the same to the master in chancery, Hon. Isaac Powers, who, on the 20th day of August, 1912, filed his report, which appears on pages 49 and 53 of the printed record in Circuit Court of Appeals. The 16th and 18th findings of fact are as follows:

"16. That after taking possession of said Virginia land and after time for discovering the condition and value of said land had elapsed and after the commencement of the action to rescind the contract, the complainant cut down a large amount of the timber then growing on said land."

18. That complainant has sustained damages by reason of the acts and doings aforesaid of the defendants, Edward Renard and Mary C. Gilmore, in the sum of \$5,880, as follows: Loss of the 240 acres of Knox County land of the value of \$60 per acre, or \$14,400, less the value of defendants' interest in the Virginia land, which was worth \$15 per acre, or \$4,470, less the amount of the encumbrance thereon of \$4,000, leaving defendants' interest in said land of \$470, together with the assumption by the defendant, Renard, of the \$5,000 mortgage on the Knox County land, and also the \$3,050 paid complainant as a balance due in the exchange, leaving complainant's damage sustained as aforesaid the sum of \$5,880." (See Pr. Tr. of Rec., p. 52.)

This report was submitted to the court, Hon. W. H. Munger presiding, and his order or judgment is as follows:

"This case having been submitted to the court upon the pleading and evidence, the court finds that the complainant, by his own voluntary act in cutting from the timber upon the Virginia lands received by him in exchange for lands held by him in Nebraska—the amount of timber so cut consisting of at least some thirteen or fourteen hundred logs—has, by such action, prevented defendants being placed in *statu quo*, and such action being a ratification of the sale on the part of complainant, that complainant is not entitled to equitable relief, his remedy for the alleged fraud committed upon the part of defendants being one at law; that, by Equity Rule No. 22, it is provided—

"If, at any time, it appears that suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential.

It is, therefore, ordered that the master's report be vacated and set aside and said action be, and it is, transferred to the law side of the court; and that complainant and respondents file amended pleadings to conform with an action at law.

Defendants further except to the order and judgment of the court transferring the action to the law side of the court, and defendants each and severally request that the court find for and enter a decree dismissing complainant's bill for want of equity; which request is by the court overruled, to which defendants each severally except.

WM. H. MUNGER, Judge."

(See Pr. Rev. pp. 53 and 54.)

It is, therefore, of record in this case that the complainant tried out to an adverse finding, so far as he is concerned, his right to a rescission of the contract set forth in his bill of complaint, and under the facts established in this case and found by both the master in chancery and the court to whom the same was submitted and by the latter was adjudged and decreed to be without right to the relief sought. After having so tried out his right to rescind the contract without any application on his part whatsoever, but upon the motion of the court, the cause was transferred to the law side of the court. To the order transferring the case to the law side of the court the defendants objected and excepted.

The plaintiff's so-called "amended petition" was filed as shown by the record; the motions of the defendants filed and ruled upon as shown by the printed transcript, and the rulings excepted to by the defendants. Thereafter answers were filed by the defendants and these in turn attacked by the plaintiff's motion, which was sustained, except as to the 8th paragraph of the motion calling for a reforming of the pleadings. (See Pr. Rec. pp. 61 to 86.) Replications were then filed to the answers.

The original complaint prayed for a rescission of the contract and for damages incident to such rescission, which, if granted would place the complaint in *statu quo*. It nowhere presented a claim for the difference in the values of the tracts exchanged, nor did it seek for a recovery of the difference between the actual and alleged represented value of the Virginia land. The master and the trial court found that because of the acts of the complainant committed after the action was commenced that he was not entitled to a rescission.

The amended petition is an action for damages for fraudulent representations inducing the contract, in other words, it is an action for deceit. The "amended petition" was filed more than four years after the discovery of the alleged fraudulent representations or more than four years after the filing of the bill of complaint. Both the bill of complaint and the "amended petition" allege the same facts as a basis for relief sought for by each of them, except as to the allegation of damages. (Pr. Rec. pp. 1 to 20 and 55 to 60.)

The defendants each alleged in their answers to the "amended petitions," among other matters of defense, the foregoing facts as to the report of the master, the finding and order of the court on the evidence taken in the suit in equity, which matters on plaintiff's motion were stricken from the answers. The answers also set forth as a defense the fact that more than five years had elapsed since plaintiff had discovered the alleged fraud and that it was barred by the statute of limitations.

It is claimed by the petitioner that by reason of the sustaining of his motion to strike parts of the defendants answers that the court struck from those answers the defense of the statute of limitations. In this the petitioner is in error. The statute of limitations as pleaded in those answers is found in paragraph 5 thereof and is as follows:

"That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and by his attorneys prior to the 22nd day of September, 1908, when said action was commenced and prior to the first day of September, 1908, and that more than five years had elapsed after full knowledge by said plaintiff and his attorneys of all of the facts and alleged fraudulent representations and since the

plaintiff cut and destroyed said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of the action set forth in the amended bill of complaint is barred by the statute of limitations." (Pr. Rec. pp. 76 and 77.)

That part of the petitioner's motion attacking this paragraph of the answer is the fifth paragraph of the motion and is as follows:

"5. To strike out the words "is barred by the statute of limitations" in paragraph five (5) of said answers, because the same is redundant and irrelevant matter and states a legal conclusion and is inserted in said answers to the prejudice of the plaintiff." (Pr. Rec. p. 83.)

The trial court held that the statute of limitations was sufficiently pleaded. In any event, it was raised by the objections to the empanelling of the jury and the objection to the introduction of any evidence made by the defendants at the commencement of the trial.

The Nebraska statute of limitations applicable is as follows:

7563. Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued.

7569. Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Rev. Stat. (Ed. 1913), Secs. 7563 and 7569. The sections quoted were formerly Sections 5 and 12, respectively, of the Nebraska Code of Civil Procedure.

At the time of the making of the order transferring this action to the law side of the court, at all times since, and to all rulings on the motions made since, the defendants have excepted and have in all proper ways objected to the proceeding under the amended petition.

Having entered into the stipulation set forth on pages 99 to 102 of the printed record, a motion was made by the defendants for an instructed verdict, which was sustained by the court, and a verdict for the defendants was returned and judgment entered thereon. This judgment dismissing the plaintiff's cause of action was reviewed by the Circuit Court of Appeals for the Eighth Circuit and by it affirmed. (See Friederichsen vs. Renard et al., 231 Fed., 882.) The plaintiff seeks by the writ of certiorari to review the record so made.

POINTS CONCEDED BY THE DEFENDANTS.

I.

It is conceded by the defendants that when equity has once obtained jurisdiction of an action, that it will retain the case and administer a purely legal remedy, if the court on the trial determines it should under all circumstances grant the equitable relief sought or some part thereof.

II.

It is conceded by the defendants that where a suitor institutes an action, seeking a remedy which by reason of the law he is not entitled to, at the time he commenced the action, he is not barred thereby from bringing and prosecuting an action for the proper remedy.

III.

It is conceded by the defendants that when a suitor is in ignorance of the facts or some of them and commences an action under a misapprehension of the true facts, which results in his defeat, he may then institute the proper action and he will not be barred by his previous defeat.

IV.

It is conceded that an amendment made by a plaintiff to the statement of his cause of action will relate back to the commencement of that action and prevent the bar of the statute of limitations, but such amendment must not change the cause of action.

V.

It is conceded by the defendants that an action at law may be changed to a suit in equity or a suit in equity may

be changed to an action at law so long as the basis of the cause is not changed and the relief sought is the same.

POINTS CONTESTED.

I.

The cause of action set forth in the "amended petition" is not the same cause of action averred in the bill of complaint.

II.

Where a suitor has two or more inconsistent remedies arising out of the same transaction open to him, and with full and complete knowledge of all the facts, selects one of these remedies and prosecutes it to a decision adverse to himself and his defeat is brought about by his own wilful act committed after the commencement of the action, he has exercised his right to elect his remedy and may not thereafter pursue any other remedy.

III.

Where there are two or more inconsistent remedies arising out of the same transaction, and one is selected and pursued until the period of limitation has expired the pleading can not be so amended as to change the cause of action and escape the bar of the statute.

IV.

The statute of limitation runs until the pleading is filed which gives the court jurisdiction of the particular cause of action upon which the recovery is sought.

V.

An action to rescind a contract is a different cause of action from an action for deceit. They are what are termed inconsistent actions. The first disaffirms the contract and avoids it. The latter affirms the contract and seeks to recover by reason of it.

VI.

Rulings on motions and demurrers made in the course of framing the issues do not become res judicata as to the merits of the case, unless they determine the case finally for that court.

VII.

Equity Rule 22 is not intended to and does not authorize an action to be transferred to the law side of the court and there changed into another cause of action.

VIII.

The decision in this case is in conflict with no decision of this Court or the Circuit Court of Appeals or of the Supreme Court of Nebraska, and is in harmony with the decisions of each of these courts.

QUESTIONS PRESENTED.

Briefly stated the questions are:

I.

Does the selection of one of two inconsistent remedies and its prosecution to an adverse finding by reason of the complainants own fault, bar the complainant from availing himself of the other inconsistent remedy?

2.

Where the remedy selected was that of rescission of a contract claimed to have been induced by fraud and the complainant destroys in part what he has received after he made his selection, and so prevented his success in the equitable action, can he by amendment change the form of the action to that of damages for deceit?

3.

Is the statute of limitations available as a defense where the action for deceit is commenced by filing an "amended petition" on the law side of the court after the case has been transferred from the equity side of the court under Equity Rule 22, after the statute has run?

I.**1.**

THE WRIT SHOULD BE DISMISSED WHERE THE PETITION OOMITS MATERIAL FACTS OR THE HEARING DISCLOSES THAT THE WRIT WAS IMPROVIDENTLY GRANTED.

Houston Oil Company et al. vs. Goodrich. (Decided Jan. 7, 1918.) U. S. Adv. Ops. 1917 p. 167.

Furness W. & Co. vs. Yanz Tsze Ins. Asso.—242 U. S. 430 L. Ed. 409.

United States vs. Rimer—220 U. S. 547-55 L. Ed. 578.

2.

NO QUESTION OF SUFFICIENT IMPORTANCE IS PRESENTED.

In re Law Ow. Bew.

141 U. S. 583-589; 35 L. Ed. 868-870.

In re Woods 143 U. S. 202-206; 36 L. Ed. 125-126.

American Const. Co. vs. Jacksonville T. K. W. Ry. Co. 148 U. S. 372-378; 37 L. Ed. 486-492.

Forsythe vs. Hammond, 166, U. S. 506-515; 41 L. Ed. 1095-1099.

3.

THIS CASE WAS NOT ONE PROPERLY TRANSFERABLE UNDER EQUITY RULE 22.

(a.) The complainant in September, 1908, had two inconsistent remedies. He selected that of rescission and prosecuted it to an adverse decision, the defeat coming because of his own acts committed after his selection of remedy and bars the present action for deceit.

Peters vs. Bain—133 U. S. 670; 33 L. Ed. 696.

Robb vs. Voss—155 U. S. 13; 39 L. Ed. 52, 61-62.

Stewart vs. Hayden—72 Fed. 403, 411-412.

Turner vs. Grimes—75 Neb. 412.

First Natl. Bank vs. McKenny—47 Neb. 149, 151-2.

Pollock vs. Smith—49 Neb. 864-868.

First Natl. Bank of Chadron vs. Tootle—59 Neb. 44, 46.

Boggs vs. Young—81 Neb. 621, 624-5.

Watson vs. Perkins, 88 Miss. 64.

Rowell vs. Smith—123 Wis. 510.

Conrow vs. Little—115 N. Y. 387, 393.

Quinn vs. Workingman's Building & Loan Assn., 7 Ky. Law Rep. (Abstract) 386.

Roban v. Same—Id.

Wilkins vs. Same—*Id.*
Blaker vs. Morse, 55 P. 274, 60 Kan. 24.
Missouri Pac. Ry. Co. vs. Henrie, 65 P. 665, 63 Kan. 330.
Sweet vs. Montpelier Sav. Bank & Trust Co., 77 P. 538, 69 Kan. 641.
Black vs. Miller, 42 N. W. 837, 75 Mich. 323.
Wright, Barrett & Stilwell Co. vs. Robinson, 82 N. W. 632, 79 Minn. 272.
In re Pedersen's Estate, 106 N. W. 958, 97 Minn. 491.
Pederson vs. Christopherson, *Id.*
Nanson vs. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.
Citizen's Nat. Bank vs. Wetsel, 88 N. Y. S. 1079, 96 App. Div. 85.
Whipple vs. Stephens, 57 A. 375, 25 R. I. 563.
Rowell vs. Smith, 102 N. W. 1, 123 Wis. 510.
Herrington vs. Hubbard, 2 Ill. (1 Seam.) 569, 33 Am. Dec. 426.
White vs. White, 68 Vt. 161, 34 Atl. 425.
Wheeler vs. Dunn, 13, Colo. 428, 22 Pac. 827.
Marston vs. Humphrey, 24 Me. (11 Shep.) 513.
Dyckman vs. Seavaston, 39 Minn. 132, 39 N. W. 73.
Fowler v. Bowery Sav. Bank, 10 Am. St. Rep. 479, note 487-494.

(b) The finding, after a submission to the court, was against the complainant. That finding was not excepted to and stands today unchallenged.

4.

THIS WAS NOT A CASE PROPERLY TRANSFERABLE UNDER EQUITY RULE 22.

Wright vs. Barnard—233 Fed. 329-330-331.

Gatewood vs. New River Con. Coke & Coal Co.—239 Fed. 65-67.

5.

When transferred there were no rights conferred that did not inhere in the case as originally brought. The transfer could not remove the bar of the statute of limitations. It could not and did not pretend to permit the bringing in of a new cause of action.

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II.

THE JUDGMENT OF THE TRIAL COURT DISMISSING THE ACTION SHOULD BE AFFIRMED.

I.

Because the action was not commenced until more than four years after the cause of action arose.

Rev. Stat. of Nebraska (Ed. 1913) Secs. 7563, 7569:

7563. "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

7569. "Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property; including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

(The sections quoted were formerly cited as sections 5 and 12 respectively of the Nebraska Code of Civil Procedure.)

Kohart v. Thomas—4 Neb. (Unof.) 80, 84.

Forsyth v. Esterday—63 Neb. 897.

Gillespie vs. Cooper—36 Neb. 776.

Hughes vs. Honsel—33 Neb. 703.

Amstfield vs. Moore—30 Neb. 385.

To amend a bill of complaint by changing the cause of action from one to rescind a contract for the exchange of lands and to annul the deeds to an action for damages for deceit is to commence a new cause of action and the statute of limitations runs until the filing of the amended petition.

U. P. Railway Co. vs. Weyler, 158 U. S. 285-289, 298; 39 L. Ed. 983.

Whalen vs. Gordon, 95 Fed. 305.

Friederichsen vs. Renard et al., 231 Fed. 882.

In re Kemper, 142 Fed. 210-212.

Patello vs. Allen West Com. Co., 131 Fed. 680.

Hall vs. The L. & N. R. Co., 157 Fed. 446.

Goodman vs. The City of Fort Collins, 164 Fed. 970*
972.
Krotty vs. The Chicago & Great Western R. R. Co.,
169 Fed. 593, 598.
Long vs. Choctaw O. & B. R. Co., 198 Fed. 38, 48.
Melvin vs. Hagadon, 87 Neb. 398.
Buerstetta Adm'r. vs. Tecumseh Nat. Bank, 57 Neb.
504, 507-8.
Clifford vs. Thum, 74 Neb. 831, 833-4.
Westover vs. Hoover, 94 Neb. 596.
Johnson vs. Am. St. & R. Co., 80 Neb. 250-253.
Davis vs. Manning, 97 Neb. 658.

2.

The issues raised as to the cause of action set forth in the bill of complaint after a hearing on the merits has been determined by both the master and the court against the complainant because of his own acts committed after the commencement of the action. Having selected the remedy of rescission, he is bound by his election and the decision of the court.

Robb vs. Von, 155 U. S. 13, 41-43.
Stewart vs. Hayden, 72 Fed. 403, 411-412.
Turner vs. Grimes, 75 Neb. 412.
First Nat. Bank of Chadron vs. McKinney, 47 Neb.
149, 151-2.
Pollock vs. Smith, 49 Neb. 864-868.
First Nat. Bank of Chadron vs. Tootle, 59 Neb. 44, 46.
Boggs vs. Young, 81 Neb. 621, 624-5.
Watson vs. Perkins, 88 Miss. 61.
Howell vs. Smith, 123 Wis. 510.
Conrow vs. Little, 115 N. Y. 387, 393.
Quinn vs. Workingman's Building and Loan Assn.,
7 Ky. Law Rep. (Abstract) 366.
Rahan vs. Same, Id.
Wilkins vs. Same, Id.
Blaker vs. More, 55 P. 274, 60 Kan. 24.
Missouri Pac. Ry. Co. vs. Henrie, 65 P. 665, 63 Kan.
330.
Sweet vs. Montpelier Sav. Bank & Trust Co., 77 P.
538, 69 Kan. 641.

Black vs. Miller, 42 N. W. 837, 75 Mich. 323.
Wright, Barrett & Stilwell Co., vs. Robinson, 82 N. W. 632, 79 Minn. 272.
In re Pedersen's Estate, 106 N. W. 958, 97 Minn. 491.
Pederson vs. Christopherson, Id.
Nanson vs. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.
Citizens' Nat. Bank vs. Wetsel, 88 N. Y. S. 1079, 96 App. Div. 85.
Whipple vs. Stephens, 57 A. 375, 25 R. L. 563.
Rowell vs. Smith, 102 N. W. 1, 123 Wis. 510.
Herrington vs. Hubbard, 2 Ill. (1 Seam.) 569, 33 Am. Dec. 426.
White vs. White, 68, Vt. 161, 34 Atl. 425.
Wheeler vs. Dunn, 13 Colo. 428, 22 Pac. 827.
Marston vs. Humphrey, 24 Me. (11 Shep.) 513.
Dyckman vs. Seavaston, 39 Minn. 132, 39 N. W. 73.
Fowler vs. Bowery Sav. Bank, 10 Am. St. Rep. 479,
note 487-494.

3.

The record in this case does not present a case properly transferrable under Equity Rule 22.

Gatewood vs. N. R. Con. Coal and Coke Co., 239 Fed. 65, 67.
Wright vs. Barnard, 233 Fed. 329, 330-331.

4.

The Amended petition so called does not present an amendment of the cause of action set forth in the bill of complaint, but presents an entirely new cause of action and is therefore filed without authority under the order made when the case was transferred.

Shields vs. Barrow, 17 How. 130, 143-144, 15 L. Ed. 158, 162.
Smith vs. Woolfolk, 113 U. S. 143, 148, 29 L. Ed. 357, 359.

5.

This Court, the Circuit Court of Appeals, and the Supreme Court of Nebraska have all held that an action to rescind and an action for deceit are inconsistent.

Union Pac. R. R. Co. v. Weyler, 158 U. S. 285-291.
Robb v. Vos, 155 U. S. 13, 41-43.
Whalen v. Gordon, 95 Fed. 305.
Stewart v. Hayden, 72 Feb. 403, 411-412.
Friederichsen v. Renard et al., 231 Fed. 882.
First Nat. Bk. of Chadron v. McKinney, 47 Neb. 149,
151-2.
American Bldg. & Loan Ass'n v. Rainbolt, 48 Neb.
434, 440.
Pollock v. Smith, 49 Neb. 864-868.
First Nat. Bk. of Chadron v. Tootle, 59 Neb. 44, 46-48.
Boggs v. Young, 81 Neb. 621-624-5.

6.

If the actions are inconsistent the one cannot be an amendment to the other and the statute of limitations runs until the amended petition is filed. On this question the decision of this Court, of the Court of Appeals and of the Supreme Court of Nebraska are harmonious.

Friederichsen v. Renard et al. 231 Fed. 882.
Whalen v. Gordon, 95 Feb. 305, 309.
U. P. R. R. Co. v. Weyler, 158 U. S. 285, 289, 298;
39 L. Ed. 983.
In re Kemper, 142 Fed 210-212.
Patello v. Allen-West Com. Co., 131 Fed. 680.
Hall v. The L. & N. R. Co., 157 Fed. 446.
Goodman v. The City of Fort Collins, 164 Fed. 970,
972.
Krotty v. The Chicago & Great Western R. R. Co.,
169 Fed. 593, 598.
Long v. Choctaw O. & C. R. Co., 198 Fed. 38, 48.
Melvin v. Hagadon, 87 Neb. 398.
Buerstetta, Adm'r. v. Tecumseh Nat. Bk., 57 Neb.
504, 507-8.
Clifford v. Thunn, 74 Neb. 831, 833-4.
Westover v. Hoover, 94 Neb. 596.

7.

If in ruling upon the motion to strike the amended petition or the motion to strike parts of the answer thereto the court committed error it can at any subsequent time prior

to or at the entry of the final judgment change the effect of that ruling.

Knight vs. Finney, 59 Neb. 274.

Perry vs. Baker, 61 Neb. 841, 843-845.

Tiernan vs. Miller & Leith, 69 Neb. 764, 765-766.

Follmer vs. State, 94 Neb. 217, 219; 69 Neb. 533-535.

Poost vs. Pearson, 108 U. S. 418; 27 L. Ed. 774.

8.

QUESTIONS NOT RAISED IN THE CIRCUIT COURT OF APPEALS WILL NOT BE CONSIDERED IN THIS COURT.

Rogers v. Ritter, 12 Wall. 317, 320; 20 L. Ed. 417.

The Vanderbilt, 6 Wall. 225, 230; 18 L. Ed. 823.

Robinson & Co. v. Belt, 187 U. S. 41, 50, 48 L. Ed. 65.

Hageman v. Springer 189 U. S. 505; 47 L. Ed. 921.

This rule is not affected by state statutes.

St. Clair v. United States, 154 U. S. 134; 38 L. Ed. 936.

9.

Appellate jurisdiction is restricted to final judgment.

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893.

American Const. Co. vs. Jacksonville T. K. W. Ry. Co., 148 U. S. 372, 37 L. Ed. 486.

Kirwan v. Murphy, 170 U. S. 205, 42 L. Ed. 1009.

Ex parte National Enameling & Stamping Co., 201 U. S. 156, 50 L. Ed. 707.

Heike v. United States, 217 U. S. 423; 54 L. Ed. 821.

Robinson v. Belt, 6 Fed. 328.

Gladys Belle Oil Co. v. Mackey, 215 Fed. 129.

ARGUMENT.

I.

THE WRIT SHOULD BE DISMISSED.

The statement of the case in the petition has averred that the same identical cause of action was set forth in the "amended petition" as had been stated in the bill of complaint. (Petition for writ, page 9.) This statement is incorrect. The bill sets forth the alleged fraud and seeks a rescission of the contract, tenders back the land received in

exchange, and asks for incidental damages occasioned by an auction sale, his moving expenses and loss occasioned by a season's farming in Virginia. (Pr. Rec. pp. 1-20.)

The amended petition is an action for deceit. (Pr. Rec. pp. 55-60.) The one disaffirms the contract, the other affirms it. In the one the petitioner seeks to recover the land in Nebraska, which he formerly owned, and in the other he retains the land in Virginia and asks for a money judgment for the difference in the value of the land in Virginia and its value as represented by the defendant, Renard. The one secures him the Nebraska tract, the other imposes a judgment upon all of the defendants' estate. The one can be brought only in the district where the land is situated and the other can be brought wherever the defendants can be served.

WHALEN VS. GORDON.

The case of Whalen vs. Gordon 95 Fed. 305, 309, has ably and thoroughly considered the questions presented as to the election of remedies and the statute of limitations as presented by this case. That it is recognized as the barrier is apparent from the labored effort of the petitioner in his attempts to avoid it and throw doubt upon it. Yet certainly the court that rendered this decision and that in the case of Schurmier, knows whether it has been overruled.

Section 7613 (Rev. Stat. of Neb. Ed. 1913) is as follows:

"If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover the possession thereof. And if the property be an entire tract, situated in two or more counties, an action to recover the possession thereof may be brought in either of such counties; but if it consists of separate tracts in different counties, the possession of such tracts must be recovered by separate actions brought in the counties where they are situated."

This rule applies in federal courts, except that the district takes the place of the county. *Ment. Man. of Fed. Pro. Secs. 160-165.*

THE BILL OF COMPLAINT DOES NOT PRESENT A CASE FOR DAMAGE.

It is claimed on page 13 of reply brief in paragraph (j) that paragraphs 1 and 2 of the bill of complaint and paragraphs 5 and 6 of its prayer, form the basis for a recovery of damages in the absence of a decree of cancellation. Such argument is trifling. The bill will support no such conclusion. It makes the allegations of the bill of complaint as to the loss occasioned by the auction sale of petitioner's property, his loss in moving expenses and his loss by reason of farming in Virginia outside the bounds of reason.

Counsel for petitioner would have seriously resented such a construction placed upon his bill of complaint, had it been suggested at any time prior to the order of transfer. The cases cited in support of the statement do not support the rule contended for. They hold that where a trial has been had without question as to the sufficiency of the petition, after judgment, it will be liberally construed so that it may support the judgment. They go no farther.

The equitable action was prosecuted to a finding adverse to the petitioner, not because he had mistaken his remedy, not because he was ignorant of the facts, not because there was any doubt as to his right, but because after he had commenced his action, he went upon the property he was tendering to the defendants and cut over 1400 trees and placed it beyond his power to restore the defendants to their former position.

This brings us to another erroneous statement in the petition. On page 8 of the petition it is averred that although he cut the logs, he never removed them. The facts are that having cut the trees, the trustees under the trust deed, securing the \$4000.00 loan, enjoined him from removing them and foreclosed the trust deed and sold the land under the decree. This is not set forth in the printed record, but is in the evidence taken in the equitable action. The master's report finds the foreclosure of the mortgage and the cutting of the timber. (Pr. Rec. p. 51-52, pars. 13, 14 and 15.)

The petitioner claims that the defense of the statute of limitations is struck from the defendants answer to the amended petition. In this the petitioner is mistaken, as only

the concluding words "is barred by the statute of limitations" were stricken on the petitioner's motion, because it was a conclusion of law.

NO PREJUDICIAL ERROR.

The action being one which should have been determined by dismissal at the time it was transferred to the law side of the court, any subsequent error cannot be considered prejudicial error, as to the petitioner.

NOT A CASE TRANSFERABLE UNDER RULE 22.

It having been determined that this action was an action for rescission, which was defeated by reason of the acts of the petitioner committed after the case was commenced, it was not a case to which rule 22 was applicable.

THE TRANSFER OF THE CASE TO THE LAW SIDE OF THE COURT CONFERRED NO RIGHT AS TO THE MERITS OF THE CASE WHICH DID NOT EXIST BEFORE RULE 22 WAS ADOPTED.

If the plaintiff did not have the right, before the adoption of Rule 22, to amend and add a new cause of action, this rule did not confer it. If before the rule was adopted the selection of one of two inconsistent remedies barred the pursuit of the other inconsistent remedy, the rule did not avoid the bar, and an election having been made and prosecuted to the finding made in this case, it was not proper to transfer the case.

II.

THE JUDGMENT OF THE TRIAL COURT DISMISSING THE ACTION SHOULD BE AFFIRMED.

1.

The statute of limitation, as to action of fraud in the state of Nebraska is four years. It applies to actions affecting real estate. (See authorities heretofore cited.)

A bill to rescind and an action for deceit are two different actions; each is inconsistent with the other. This has already been called to the attention of the court and authorities cited.

This rule has no exceptions. The only deviation from it is under statutory provisions. (See authorities heretofore cited.)

The statute runs until the amendment is filed, setting forth the action for damages for alleged fraud. This Court, the Circuit Court of Appeals and the Supreme Court of Nebraska have, by cases already cited, clearly, decidedly and repeatedly announced this rule. The reasoning of the cases cited is the best argument to be presented and the defendants urge the reasons so assigned.

2.

We have already called the attention of the court to the finding made in the action to rescind and here will only call attention to the authorities we have cited, that the election in a case such as this is a bar to the action for damages for alleged fraud.

3.

This not being a case which was properly transferable, there is no prejudicial error.

4, 5 and 6.

This Court, the Circuit Court of Appeals and the Supreme Court of Nebraska, having held the action for rescission and the action for damages to be inconsistent, the action for damages as stated in the "amended petition" is a new cause of action and the statute runs until the filing of the "amended petition." (See authorities already cited.)

7.

The rulings on the motions being preliminary in their nature, do not bind the trial court, when on the merits the court decides as to what course should be pursued.

The effect of the cases cited by the petitioner are all to the effect that a final judgment rendered in a court of competent jurisdiction cannot be attacked in a collateral proceeding. They are not in point in this case for the following reasons: First, this is the same proceeding in which the orders were made and is in no sense a collateral attack and the orders so made are still within the control of the court.

They are not final orders in any sense and do not determine the case or any question of law other than as to procedure.

The case of *Nuckolls vs. Irwin*, 2 Neb. 60, is not a case in point as touching the question presented by this record. In that case a judgment had been rendered, the time for appeal having elapsed without an appeal being perfected; a new entry was made, again entering the same judgment and an attempt made to appeal from the second entry of the order and the court held this could not be done.

In passing upon the motion of defendants to strike the amended petition of the plaintiffs, so far as it raised the question of the statute of limitations, its effect is no more than to say that the fact that it appears upon the face of a petition that the cause of action set forth in the petition is barred by the statute of limitations is not sufficient reason for striking the petition from the files. It has no other or different purpose or effect. And, if, in the making of such an order the court committed error it still is not a final judgment and at any subsequent time, prior to the entering of the final judgment, the ruling on the motion may be changed, if it were necessary, which in this case it is not.

Knight vs. Finney, 59 Neb. 274.

Perry vs. Baker, 61 Neb. 841, 843-845.

Tierman vs. Miller & Leith, 69 Neb. 764, 765-766.

Follmer vs. State, 94 Neb. 217, 219.

Sporer vs. McDermott et al., 69 Neb. 539-537.

In *Perry vs. Baker*, Supra, the court say:

"It appears from the record that the plaintiff filed a general demurrer to the defendants' answer, on the ground that it did not state facts sufficient to constitute a defense, which was sustained by the court. The defendants then took leave to amend their answer instanter; and amended by interlining the allegation that the bank did not become the owner of the note and mortgage until after the commencement of the mechanic's lien foreclosure. To this answer so amended the plaintiff filed a reply, and upon trial the undisputed evidence shows that the bank did become the owner of the note and mortgage on the 5th day of May, 1890, which was before the commencement of the mechanic's lien foreclosure; and the plaintiff now insists that the ruling of the court upon the

demurrer determines the law of the case to be that the defendants have no defense in this action unless they make it appear from the evidence that Cady was the owner of the mortgage at the time of the mechanic's lien foreclosure, and as the defendants have failed in that respect and decree must, for that reason, be in favor of plaintiff. We think this position is untenable. In *Richman vs. Board of Supervisors*, 42 N. W. Rep., 422, the Supreme Court of Iowa said (page 426): "At the trial in the district court there was a demurrer to the petition, which was overruled, after which the defendants made a return to the writ, as required by its terms. At the further hearing there was a change in the personnel of the court, and it is urged that the issues presented by the return were the same as those arising on the demurrer to the petition, and that there was a readjudication thereof against the objection of appellants, and its correctness is urged for our consideration. We think the change of judges makes no difference. It is the same court. We are not prepared to hold that if during the trial of the issues of an action a court becomes convinced of an error he may not correct it. It would be a serious impediment to a fair and speedy disposition of causes if such a rule were to obtain. If, on the trial of the issues presented by the return, questions legitimately arose involved in the issues presented by the demurrer, it was the duty of the court to pass upon them, and in so doing it was not required to follow the ruling on the demurrer as against its convictions." And this rule is affirmed by the same court in *Seery vs. Murray*, 77 N. W. Rep., 1058. Judge Hammond, of the United States District Court, in two cases, discusses the general question herein considered, and while in one case he follows the former ruling of another judge and in the other postpones his decision to avoid doing so, his reasoning in each case, supports the doctrine of the Iowa court. *Norton vs. Taxing District*, 36 Fed. Rep. 99, 102; *Louis Snyders' Sons Co. vs. Armstrong*, 37 Fed. Rep., 18, 23. The case of *Marvin vs. Weider*, 31 Nebr., 774, was decided by this court upon the proposition that the petition stated sufficient facts to constitute a cause of action; and while it is stated in the syllabus that when one judge of a district overrules a general demurrer to a petition it is error for another judge of the same district upon the trial to sustain an objection to evidence on the ground that the petition does not state a cause of action, that case must not be taken to establish the doctrine that such ruling would be re-

versible error requiring a new trial of the case notwithstanding that the petition, upon examination, should be found to fail to state a cause of action. There may be several judges of the district court in a district, but there is only one district court, and the law makes no distinction between the judges. If a judge makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the personnel changes or not. So far as a different rule was announced in *Marvin vs. Weider, Supra*, that case ought to be overruled."

An order sustaining defendant's demurrer and giving plaintiff leave to amend does not preclude the plaintiff from reviewing, or the court from entertaining, the same question of law upon the subsequent trial on an amended complaint.

Post vs. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774.

The request of the defendants for leave to withdraw their answers and file pleas in abatement was wholly within the discretion of the court and, if the order refusing the request was erroneous, only the defendants could complain and the refusal of such a request in no way decides the question as to whether the cause of action stated in the plaintiff's amended petition was barred or not.

ANSWER TO POINTS MADE IN PLAINTIFF'S BRIEF UNDER THE HEAD OF "BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI" AND COMMENCING ON PAGE 9 OF PLAINTIFF'S PRINTED "PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF" AND REPLY BRIEF.

First. It is not a fact that the plaintiff has not had a trial on the merits of his case. He tried the case under his original bill of complaint to an adverse finding by the court under which there should have been a dismissal of the case.

Second. It is conceded by the defendants that the judgment of the Circuit Court of Appeals is final unless it is reviewed and reversed on the writ of certiorari.

Third. If it was improper to transfer the case from the equity side to the law side of the court, then it has no place here and this Court has no authority to reverse any judgment which may have been entered in the Circuit Court of Appeals. The order transferring the case to the law side of the court was objected to by the defendants and when the order was made was excepted to. The record so shows. And while the plaintiff did not ask or request the order transferring the case to the law side of the court he made no objections and took no exceptions to the order so made. The cases cited in support of the proposition stated by plaintiff do not support him.

However, if it is the purpose of the plaintiff to object to this order and to assign it as an error it was not presented in the Circuit Court of Appeals and it was not presented to the trial court. This is the first attempt to raise the question and it cannot now be raised to plaintiff's advantage or the defendants' disadvantage.

Rogers v. Bitter, 12 Wall, 317, 320; 20 L. Ed. 417.

The Vanderbilt 6 Wall 225, 230; 18 L. Ed. 823.

Robinson & Co. v. Beldt, 187 U. S. 41, 50; 48 L. Ed. 65.

Hageman v. Springer 189 U. S. 505; 47 L. Ed. 921.

This rule is not affected by state statutes.

St. Clair v. United States, 154 U. S. 134; 38 L. Ed. 926.

The district court did not have a right to transfer the case to the law docket. It was properly commenced on the equity side of the court and only the act of the complainant prevented the decree he sought. Plaintiff cites Cherokee Nation vs. S. K. R. Co. 135 U. S. 641-661; 34 L. Ed. 295, 300. This case does not support the plaintiff's contention. It holds that a law action and an equitable action cannot be joined but that as the petition is framed in the alternative and prays for damages the court held it to be a petition of appeal and nothing more. The Schurman case does not sustain plaintiff's contention. It is considered by the court rendering the decision in it and in this case. The court deciding both cases knows better what it decided than does plaintiff.

United States Bank v. Lyon County (48 Fed. 692) is not in point. In that case the action was started as an equitable action when the complainant had a complete remedy at law

and a demurrer to the bill was sustained on that ground. There was a motion by the complainant to transfer to the law docket which was granted. But in the present case there was an equitable action properly commenced but which was defeated by the complainant's own acts committed after he elected his remedy and which remedy he pursued for more than four years subsequent to the acts he committed which precluded his recovery, and which remedy he pursued to an adverse finding.

The district court, however, had no right to transfer the case to the law docket for the following reasons:

a. It was not requested by the plaintiff.

b. It was objected to by the defendant.

c. It was not one of the cases which properly came under Rule 22 or any other rule permitting the transfer of causes, because at the time the case was instituted in September, 1908, the plaintiff, if his facts as alleged were established, was entitled to the relief prayed for and but for his own acts after the commencement of his action would have had a decree. If the facts were not established and could not be established as alleged in his bill he is not entitled to the relief prayed for in his amended petition filed on the law side of the court. It should be borne in mind at all times that if the plaintiff has been wronged the only reason that he is losing his remedy is because of his own wrongful act committed after the plaintiff had filed his original bill of complaint. The cases cited on pp. 19 and 20 in support of the propositions stated under the third subdivision of plaintiff's argument, do not conflict with these statements. It would take too much time and impose upon this court to review and distinguish all of the cases cited by the plaintiff.

THERE WAS AN ELECTION OF REMEDIES NOT AVOIDED BY THE TRANSFER TO LAW.

It is claimed by the petitioner on pages 8 and 9 of the "reply brief" that it was the duty of the Court to transfer the cause to the law side of the court if it was properly triable there. As stated this may be conceded but the petitioner begs the question. It was not a case triable on the law side of the court, as an election of remedies had been made and the right to the relief sought had been determined. There

was and is nothing more to try. The petitioner by reason of his own wrong committed after he had fixed his own status, has determined the suit against his own claim.

There are a line of cases from the states of Indiana and Minnesota, and which are cited on page 26 in the original brief and on page 16 of the "reply brief" which hold that where an action has been commenced to rescind a contract on the ground of fraud and dismissed before judgment, that the suitor may then commence another action for deceit. The petitioner does not come within this rule. He did not dismiss this action and start another. He pressed his suit to an adverse finding as to his interest and hence under the rule laid down in these cases he is barred as to the right to prosecute this action.

The case of *Cahoon vs. Fisher*, 146 Ind. 583, 44 N. E. R. 664. Rehearing, 45 N. E. R. 787; 26 L. R. A. 193, is the case relied upon by the petitioner to sustain him in the position he assumes. In the opinion Justice McCabe says: "The case that rules this is *Neyawander vs. Lowman*, 124 Ind. 584. In that case, like this, the action was brought to rescind the contract for fraud. Afterwards the complaint was so amended as to make it a complaint to recover damages for fraud. The answer set up the original complaint as a conclusive election of remedies in bar of the amended complaint. But it was held that such an election to be a bar must have been prosecuted to judgment."

* * * * "No one will deny the right to abandon a suit for rescission. Its abandonment involves the affirmation of the contract. Then if the plaintiff may abandon it, and thereby affirms the contract, that is all he does when he sues for damages caused by the fraud in the procurement of the contract." (45 N. E. R. 788.)

While the defendants do not concede the position assumed above to be correct and assert that the authorities cited in this argument hold otherwise, still the petitioner's case is not saved by this rule. The petitioner never abandoned his action to rescind. The court, after a full hearing, found against him and should have entered an order dismissing his bill.

However, if the transfer of the case and the filing of the

"amended petition" is an abandonment of his action to rescind, then his abandonment of his first cause of action coming five years after the original cause of action accrued, the new action is barred by the statute of limitations.

Each and all of the cases cited in the briefs of the petitioner on this phrase of the case assume or expressly hold that the action to rescind and the action for damages because of the fraud are inconsistent,—are different and distinct causes of action.

EQUITY HAVING JURISDICTION COULD RETAIN IT¹⁷

It is claimed by the petitioner that when equity has once obtained jurisdiction that it brought in the entire transaction so that if it could not decree a rescission it could award damages in lieu thereof. (Original brief p. 19 and reply brief pp. 10 and 11.)

The cases cited do not sustain the petitioner in this position. *Lefevere vs. Chamberlain*, 117 N. E. R. 327, is a case where the complainant offered in his bill to accept in lieu of performance the difference in value. Under the North Carolina system of pleading and procedure the plaintiff is not restricted to the relief demanded in his bill but may have anything his facts alleged and proved will entitle him to.

The correct rule is stated in the cases cited by the petitioner. In *Blue Ridge Electric Co. vs. American Bank Note Co.*, 237 Fed. 756, 759, it is clearly announced in the following language: "*A Court of equity may administer a basic common law remedy when, and only when, it is incidental to the enforcement of some equity which gives the court jurisdiction.*"

We quote from the opinion on page 760: "It is a principle of equity too well settled to require citation that, in a case where equity exists this equity will draw to itself all questions in the case necessary to be decided, and the chancery court will with the decree settle all questions relating to the case, although as to some of them, if raised independently, equity would have no jurisdiction, and a common law court could afford a full and adequate relief. IT IS EQUALLY WELL ESTABLISHED, HOWEVER, THAT IF THE EQUITY UPON WHICH DEPENDS THE JURISDICTION

OF THE CHANCERY COURT FAILS, THAT COURT
MAY NOT PROCEED AND ADMINISTER A BARE
COMMON LAW REMEDY.

Fourth. In the portion of our argument heretofore presented we have called attention to that which is an answer to this proposition but we will restate it as briefly as we can. The point presented by the plaintiff is that, regardless of whether the statute of limitations is correctly applied to this case or not, because the order of Judge McPherson overruling the defendant's motion and the order of Judge McPherson sustaining the plaintiff's motion, not having been appealed from, they become the law of this case without any reason as to why the motions were sustained being given, the plaintiff claiming that the court in sustaining said motions held that the statute of limitations did not apply to this case, regardless of what the facts were. If this contention is true we are in the following condition: The rulings on those motions are not final orders. A final order under the ruling of all federal courts is such an order as determines the litigation between parties so that nothing remains but to enforce the judgment entered. That the appellate jurisdiction is restricted to final judgments see the following cases:

Robinson v. Belt, 6 Fed. 323.

Gladys Belle Oil Co. v. Mackey, 216 Fed. 129.

and many other cases by the Circuit Courts of Appeals.

McLish v. Roff, 141 U. S. 661; 35 L. Ed. 893.

American Construction Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372; 37 L. Ed. 486.

Kirwan v. Murphy, 170 U. S. 205; 42 L. Ed. 1009.

Ex parte National Enameling & Stamping Co., 201 U. S. 156; 50 L. Ed. 707.

Heike v. United States, 217 U. S. 423; 54 L. Ed. 821.

If the defendants could not appeal from the order on the motions they were of necessity required to await until a final judgment against them was entered before they could review or change this order. It would follow that if the course plaintiff's counsel contends for is pursued that this court should in reviewing the proceedings reverse the case and remand it for a new trial. When a new trial was had the district could, of necessity, have to follow the instruction

given and enter a judgment against the defendants. The defendants would then take the case to the Circuit Court of Appeals and if that court then reversed the order and held that the defendant's motion should have been sustained, that the plaintiff's motion should have been overruled, again the case would be reversed and sent back for retrial.

The Circuit Court of Appeals did not mistake the plaintiff's ground but it went to the gist of the question as to whether or not the statute of limitations was correctly applied by the trial court, because it would be a vain thing to go "round Robin Hood's barn" in such case. Not only did the Circuit Court of Appeals not misconceive the petitioner's contention, but it correctly interpreted his position but disapproved it and then applied correctly the rule of law as to the application of the statute of limitations in this case.

Before leaving this proposition we wish to call the attention of the court to a misstatement made under this proposition on p. 20 of the plaintiff's brief as to just what the court (Judge McPherson presiding) did. The only part of the plaintiff's motion to strike from the answer of the defendant anything with reference to the statute of limitations is in the 5th paragraph of the motion and is as follows:

"5. To strike out the words 'is barred by the statute of limitations' in paragraph five (5) of said answers, because the same is redundant and irrelevant matter and states a legal conclusion and is inserted in said answers to the prejudice of the plaintiff." (See Pr. Rec. v. 83), and strikes the last seven words of the 5th paragraph of plaintiff's petition. The 5th paragraph of plaintiff's petition is as follows:

"That all of the facts and the alleged fraudulent representations set forth in the original bill of complaint and also in the amended petition were known by the plaintiff and his attorneys prior to the 22nd day of September, 1908, when said action was commenced and prior to the first day of September, 1909, and that more than five years had elapsed after full knowledge by said plaintiff and his attorneys of all of the facts and alleged fraudulent representations, and since the plaintiff and each defendant said timber before the present cause of action was commenced or the amended petition was filed and that the alleged cause of action set forth in the

amended bill of complaint is barred by the statute of limitations." (See *Pr. Rec.* pp. 76 and 77,) and which plea was by the trial court held to be a sufficient plea of the statute of limitations. (See plaintiff's original brief in the Cir. Ct. of App. p. 10.) Hence counsel is mistaken when he states in his brief in support of the petition for the writ of certiorari that there was a motion sustained to "strike out the plea of the statute of limitations" nor is there any record which discloses that there was a ruling "refused" to permit such plea to be filed.

Fifth. The cases cited in support of the 5th proposition and also in support of the 4th proposition submitted by plaintiff do not sustain the positions there stated. The finding made by the court (Hon. W. H. Munger presiding), so far as it affects the present hearing was a determination of the following facts only, to-wit: In September, 1908, when the complainant filed his bill of complaint he was entitled to the relief he asked. Because of his own wrong doing in October and November, 1908, he precluded himself from securing the relief he had prayed for. It follows from this that by the commencement of his action to rescind and the prosecution of the same to an adverse finding he had elected his remedy and was estopped thereby to pursue any other.

Sixth. This proposition is an attempt on the part of the plaintiff to come within a rule which is well settled—that where one mistakes his remedy and pursues the action to defeat it is not an election but in this case the plaintiff did not mistake his remedy. He had, at the time he commenced the suit, a right, according to the findings, to the particular remedy he prayed for but afterwards, not by accident, but intentionally and knowingly did those things (cut the timber), which deprived him of the right to the remedy he sought in the equitable action and then after having done those things he did not give up the prosecution of his suit but insisted on the remedy he had given up and pursued the same until the court had found that at the time of the commencement of the action he was entitled to the relief he sought, but that by his own acts committed before and notwithstanding the commencement of the action he had precluded himself in such fashion that he was not entitled to the relief he sought.

It should be borne in mind that the report of the master, his findings and recommendations were set aside and that then the court on the evidence returned, found as stated in plaintiff's petition for the writ of certiorari on p. 8, as follows: "The court finds that the complainant by his own voluntary act in cutting the timber from the Virginia lands received by him in exchange for the lands held in Nebraska—the amount of timber so cut consisted of at least some 1,400 logs—has, by such action, prevented the defendants being placed in *statu quo* and such action being a ratification of the sale on the part of complainant." See order made on December 19, 1913, by the court, Hon. Wm. H. Munger, Judge, presiding. (Pr. Rec. pp. 53, 54.)

But should the master's findings be the ones upon which plaintiff would base his relief he still is in the same position because at the very time he made his election and started the action it laid wholly with himself as to whether or not he would refund the money paid to him by Renard or make excuse therefor and if he did make excuse therefor it was not a sufficient reason. If he did not make an excuse therefor the presumption is he had none.

Under this subdivision of plaintiff's argument he also presents this proposition, that where a victim of a wrong has inconsistent remedies and he is doubtful which is the right one he may pursue any or all of them until he recovers through one. But in this case there is no doubt. In September, 1906, he could have recovered under either of the two remedies he had. It isn't a question of doubt. It is a case wherein the plaintiff fails because of his own wrongful act after he had commenced his action. To go further it is certain that the cause of action set forth in the amended petition is not an amendment of the cause of action set forth in the bill of complaint. It is a different cause of action commenced after the bar of the statute of limitations was complete.

THE ACTIONS ARE NOT IDENTICAL AND THE STATUTE RUNS UNTIL THE FILING OF THE AMENDED PETITION.

On page 14 of petitioner's reply brief is the statement that the filing of the bill of complaint and the service of process prevented the running of the statute of limitations as

against the cause of action averred in the amended petition. None of the cases cited by him support this statement. Section 7080 of the Revised Statutes of Nebraska is cited in support of the statement. The section referred to provides that an action is commenced when the summons, which is finally served upon the defendant is issued. Section 7024 of the Revised Statutes of Nebraska, edition 1913 is as follows: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." The cases cited hold that when the amendment assents in stating the same cause of action as that originally set forth, then it relates back to the filing of the commencement of the action.

It must be conceded by the petitioner that if the bill of complaint in this case had sought to recover damages in the sum of \$9000.00, because the sale held in March, 1908, of personal property of John Friederichsen, the complainant, had been injured by the act of Edward Blizard and five years afterward they had brought an action by amending their petition to recover damages in the sum of \$11,000.00 by reason of the difference between the represented value of the Virginia land and the actual value, that it would not be the same cause of action, and yet this is the most liberal construction of the petitioner's claim. In 1908 he instituted an action to rescind the contract obtained by fraud, to disaffirm and cancel the contract and annul the deeds made under the contract and in his petition tendered back the land he received through the exchange—the Virginia land, and incidental to that action to recover the damages occasioned to him by his sale, by removing from Nebraska to Virginia, and the loss of time and implements used in farming the Virginia land. These elements of damage could not be considered in the cause of action set forth in the amended petition. They are damages when the contract is disaffirmed; and when it is disaffirmed, as in this action presented in the amended petition, they are not elements of damages and the petitioner does not aver them in his amended petition. It does not allege loss by reason of his sale, or because of his expense in moving, or because of his loss by reason of expense of farming in Virginia.

In the action stated in the so-called amended petition, he seeks to keep the Virginia land and he wishes to recover the difference between its actual value and what he alleges was represented as its value. In the cause of action in the amended petition, there is retained no part of the cause of action set forth in the original petition. True, they both grew out of the same transaction, and same averments of fraud and misrepresentations support the case made in the pleadings, but there the similarity ceases.

As has been pointed out elsewhere, the one seeks to recover a specific tract of land to-wit: the Nebraska land, the other action set up in the "amended petition" seeks to recover a money judgment, the measure of which is the difference in value of the Virginia land, as it actually is and as it is claimed it was represented to be by the defendant, Renard, and to retain the land he seeks to return by the bill in equity.

THE PETITIONER HAD NO RIGHT TO AMEND THE COMPLAINT SETTING UP A CAUSE FOR RECLAMATION OF CONTRACT SO AS TO PRESENT AN ACTION FOR DAMAGES BECAUSE OF FRAUD.

On pages 26 to 30 of petitioner's brief and in his reply brief on pages 13 and 16 to 20 are cited numerous cases in support of the rule he contends for: That a petition even though it does not state a cause of action or is defective in other ways may be amended and that in the "amended petition" filed in this case there is a proper amending of the cause of action averred in the bill of complaint.

It is not within the limits of the time at defendants disposal to distinguish the cases cited. But it may be said that not a single case of those cited go to the extent claimed and a majority of them hold directly against the position assumed by the petitioner. They are cases holding in support of proposition entirely within the "points conceded" by the defendants.

No case has been cited by the petitioner which in the absence of express statutory provision, holds that by amendment you can change a cause of action and by so doing avoid the running of the statute. North Carolina has such a statute.

UNION PACIFIC R. R. CO. VS. WEYLER.

The case of the Union Pacific R. R. Company, 158 U. S. 285, 291 has been recognized as fixing the question of the statute of limitations as applied to a case when a cause of action has been changed by amendment, and the rule contended for by the defendants is firmly established and recognized by all courts.

THE DEFENSE OF CUTTING TIMBER AND FORECLOSURE OF MORTGAGE WAS IN THE CASE SINCE APRIL 2, 1909.

The petitioner on page 15 of his "reply brief" under subdivision (b) of paragraph 7, takes the position that as to the cutting of the logs and the foreclosure of the trust deed on the Virginia land was not in the case when the Master in Chancery was appointed. Again, as usual he is wrong as to his facts. On April 2d, 1909, amendments as to the answers of the defendants, Edward Renard and Mary C. Gilmore were filed.

The master was appointed on April 17, 1909. The substituted and amended answers were filed later by leave of the court, but no objection was ever made to the issue thus raised and the evidence was taken, the findings made, and, until the filing of this reply brief, no objection thereto or exception to the orders were made by the complainant.

Neither in the trial court or in the court of appeals was this question raised and as it was not raised in the lower courts, it will not be considered here.

The petitioner's dilemma is the only excuse for thus attempting to change the facts shown by the complete record. Only so much of the record was incorporated as was necessary to present the question of election of remedies and the statute of limitations and the reason for attempting to have the record construed as it is not, is out of the ordinary.

In any event, the record does show that there was a finding on these questions by the master and the court, and no objection or exception taken; so far as the petitioner is concerned it is the law of the case.

It is claimed that there is a right to assail these findings collaterally. If so the petitioner is in the wrong side of the court. If those findings were wrong, only because there was no pleading of the fact to support the finding, then, this petitioner was entitled to a rescission and the case was CERTAINLY IMPROPERLY TRANSFERRED and the law side of the court has no jurisdiction, as the defendant has always objected to the transfer.

However, the master's findings were set aside by the court and the court then considered all the evidence and made its own findings which differed in some particulars from those of the master and after so doing enter a decree differing from that recommended by the master. Certainly the issue of the ent timber was made up when the court considered it.

In conclusion the defendants urge:

1. That the complainant has elected one of two inconsistent remedies and is barred from pursuing any other.
2. That the only proper judgment or decree to have entered in the equity side of the court was a decree dismissing the bill.
3. That the action was improperly transferred to the law side of the court.
4. That the cause of action set forth in the amended petition is a distinct and different cause of action from that averred in the bill of complaint.
5. That more than four years have elapsed since the cause of action accrued, hence it is barred by the statute of limitations.
6. That the judgment of the trial court dismissing the action and affirmance thereof by the circuit court of appeals should be affirmed and the judgment affirmed.

Respectfully submitted,

W. D. FUNK, Bloomfield, Nebr.

R. E. EVANS, Dakota City, Nebr.

Counsel for Respondents.

FRIEDERICHSEN v. RENARD, EXECUTOR OF
RENARD, ET AL.

CHIATORA TO THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 270. Argued April 26, 28, 1913.—Decided May 20, 1913.

Plaintiff, having been defrauded in an exchange of lands, sued in the District Court to annul his contract and deed and for incidental damages. The court finding that by acts of ownership he had affirmed the contract, by its order, under Equity Rule 22, transferred the case to the law side as an action for damages for the deceit, and the bill was amended accordingly but with no substantial change in the allegations of fraud. Meanwhile, the period of the statute of limitations had expired.

Held: (1) That the amendment did not change the cause of action and did not constitute the beginning of a new case.
(2) That, since the money relief prayed in the amended petition could properly have been sought as alternative relief in the original bill in equity, and since the transfer to the law side was made upon order of the court in the exercise of its discretion, plaintiff could not be held

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to have made such an election of jurisdiction, another as would be in the defense of limitations against the amount demanded.
261 Fed. Rep. 882, reversed.

This case is stated in the opinion.

Mr. William V. Allen for petitioner.

Mr. R. H. Egan, with whom *Mr. W. D. Funk* was on the brief, for respondents.

Mr. Justice CLARK delivered the opinion of the court.

On March 12, 1908, the petitioner, Friederichsen, contracted in writing to exchange land which he owned in Nebraska for land in Virginia owned by the respondent, Mary C. Gilmore, who in the transaction acted through her agent, Edward Renard, the defendant of the respondent G. H. Renard. We shall refer to the parties as they were in the courts below, Friederichsen as plaintiff, and Gilmore and Renard as defendants.

On September 22, 1908, Friederichsen filed a bill in equity in the United States Circuit Court for the District of Nebraska, praying for a decree cancelling the contract and the deed made pursuant thereto and for damages sustained, on the ground of fraud practised upon him.

Defendants answered denying the fraud charged, and on August 20, 1912, a master, theretofore appointed in the case, reported that Friederichsen at the time of the exchange was "below the average in mental ability;" that he had been induced to enter into the contract by the fraudulent representations of Renard, as alleged; and that he had sustained damages in the sum of \$5,000. But the master also reported that Friederichsen, after taking possession of the Virginia lands, after filing his bill in the case, and after having had time to discover the condition

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and value of the land, had cut down a considerable amount of timber growing thereon.

On the coming in of this report, the court on September 19, 1913, found that the plaintiff was not entitled to equitable relief because he had ratified the contract of exchange by cutting timber on the Virginia lands, thereby preventing the defendants from being placed in statu quo, but that his remedy was at law for damages, and thereupon it was ordered: that the master's report be vacated; that pursuant to Equity Rule 22, the cause be transferred to the law side of the court; and that the parties "file amended pleadings to conform with an action at law."

Complying with this order, on September 25, 1913, the plaintiff filed an "amended petition" on the law side of the court, and, upon the same facts stated in the original bill in equity, prayed for a judgment for damages. The defendants filed answers the same in substance as those filed in the equity suit, but adding the defense that the cause of action stated in the amended petition was barred by the Nebraska four-year statute of limitations.

When the case came on for trial, and after it was stipulated by counsel for the defendants that the plaintiff had introduced sufficient evidence to entitle him to recover a verdict, unless barred by the statute of limitations, it was ruled "that the cause of action stated in the plaintiff's amended petition was barred by the statute of limitations of the State of Nebraska, and that the filing of the amended petition did not relate back to the commencement of the action in such a way as to prevent the bar of the statute," and a verdict was directed for the defendants. The judgment entered on this verdict, affirmed by the Circuit Court of Appeals for the Eighth Circuit, is now before us for review on writ of certiorari.

Thus the case presents for decision the single question, Whether the filing of the "amended petition" on the law

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side of the court on September 25, 1913, was the commencement of a new action more than four years after the fraud was discovered, (which must have been prior to the filing of the bill in equity on September 22, 1908), which was therefore barred, or whether the proceeding at law was but pursuing toward a conclusion, in another form, the same cause of action stated in the original bill, so that the suspension of the statute of limitations continued, which began with the date of the service of the subpoena in chancery.

It is argued by the respondents that in the bill in equity the petitioners disaffirmed, while in the amended petition he affirmed the contract of exchange; that the latter for this reason states a new and different cause of action from the former, and that, against this new cause of action, the running of the statute of limitations was not arrested until the amended petition was filed, and that then it had become barred.

But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of funds, with incidental damages, while, in the amended petition, it is for damages alone. The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.

It is settled upon reason and authority that the conversion of a suit in equity into an action at law or vice versa is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original action.

It was so held by the Supreme Court of Nebraska long

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prior to the origin of the controversy we have here, when an action in ejectment was converted into a suit to redeem, *McKnight v. Hopkins*, 19 Nebraska, 33, and again, in *Butler v. Smith*, 34 Nebraska, 79, in a similar case in 1909, the question was held not to be an open one.

In *Smith v. Butler*, 176 Massachusetts, 28, followed with approval in 1917 in *Reynolds v. Missouri, Kansas & Texas Ry. Co.*, 228 Massachusetts, 584, the Supreme Judicial Court of Massachusetts declared that it had been the settled practice in that Commonwealth for a period of over fifty years to allow actions at law to be amended into suits in equity, in place of putting the plaintiff to a new suit, and to "allow those amendments on the ground that if a new suit were brought, it would be barred by the statute." It will suffice to add that in *Schurmeier v. Connecticut Mutual Life Ins. Co.*, 171 Fed. Rep. 1, the Circuit Court of Appeals, a judgment of which we are here reviewing, held that the amendment of a law action into one in equity, for the express purpose of meeting an anticipated defense of the statute of limitations, did not change the cause of action and that the amendment related to the time of the commencement of the action.

There remains to be considered the ground on which the lower courts chiefly rested their judgment, viz: That, in disaffirming the contract by his suit in equity, the petitioner elected to pursue one of two inconsistent remedies open to him, until the period of the statute of limitations had expired, and that he therefore cannot escape that bar when afterwards, by amendment of his pleadings, he seeks to affirm the contract and recover damages.

No matter what may be thought of the merit of the doctrine of election of remedies, it is a long observed and deeply entrenched rule of procedure. But, for obvious reasons, it has never been a favorite of equity and it has been specifically decided by this court that the two forms of relief pursued, before and after the amendment of the

pleadings in this case, are not so inconsistent but that both may be prayed for in one bill in equity and either granted, as the evidence and the equities of the case may require. Thus, in *Hardin v. Boyd*, 113 U. S. 756, in a suit to annul a land contract for fraud, the trial court permitted an amendment to the bill, adding a prayer in the alternative for a decree affirming the contract, granting a lien for the unpaid purchase money and for foreclosure. The decree in the case was entered on the alternative prayer.

This court affirmed that decree on principle and authority holding that:

"Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase-money. . . . The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and, in no just sense, made a new case."

In view of the New Equity Rules of 1912, especially Rule 22, and of the Act of Congress of March 3, 1915, 38 Stat. 956, it cannot be said that the power of courts of equity to amend pleadings, or to permit them to be amended, to accomplish the ends of justice, has been curtailed since the *Hardin Case* was decided in 1884.

Thus, in express terms was it decided that a properly framed prayer would have allowed the petitioner the relief in equity which he sought before the amendment or, in the alternative, that for which he now prays, and to this it must be added, that the order which converted his suit in equity into an action at law was made in the ex-

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case of a chancellor's discretion under warrant of an equity rule.

At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended, as it must be in order to reach the case at bar, for here the "amended petition" was not filed by petitioner's counsel of their own motion, but on the order of the court, entered in its discretion, to promote the ends of justice.

Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the Circuit Court of Appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do.

The questions of procedure being thus cleared away, there is little further difficulty with the case. As we have seen, the "amended petition" was not filed in a new case but was simply a step forward in progress toward settlement of the original controversy; the allegations of fact are precisely the same in substance, and almost the same in form, as they were in the original bill and therefore looking to substance and realities, they cannot be regarded as stating a new cause of action. The case falls clearly within the scope of the principle of the decisions of this court in *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 503-504; *African & Pacific R. R. Co. v. Laird*, 164 U. S. 293, 401; *Missouri, Kansas & Texas Ry. Co. v. Wolf*, 226 U. S. 370; *Seaboard Air Line Ry. v. Rane*, 241 U. S. 200; *Washington Ry. & Elec. Co. v. Scott*, 244 U. S. 630, 640.

Counsel for Appellants.

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The decision in *Union Pacific Ry. Co. v. Weller*, 155 U. S. 295, is so clearly distinguished in the *Wolf Case*, above, from the principle of those decisions that additional comment would be superfluous.

It results that the judgments of the Circuit Court of Appeals and of the District Court must be reversed and the cause remanded to the latter for further proceedings in conformity with this opinion.

Reserve.